
CANADA / JUDGMENT

Crawford v. Nazif

2019 BCSC 2337

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 2337 Crawford v. Nazif

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Crawford v. Nazif,

2019 BCSC 2337

Date: 20190906

Docket: S132325

Registry: Vancouver

Between:

Hiroka D. Crawford also known as Donna Crawford

Plaintiff

And

Dr. Anna Nazif

Defendant

And

Nicholas Osuteye

Third Party

Before: The Honourable Mr. Justice Voith

Oral Ruling re Admissibility of Documents

Counsel for Plaintiff:

S. Kovacs

J.T. Mackoff

Counsel for Defendant Dr. Nazif:

J. Meadows

D.J. Reid

A. Catalano, A/S

Place and Date of Hearing:

Vancouver, B.C.

September 3, 2019

Place and Date of Judgment:

Vancouver, B.C.

September 6, 2019

- [1] THE COURT: The Defendant, Dr. Nazif, seeks rulings on the admissibility of various documents that the Plaintiff, Ms. Crawford, seeks to rely on in the parties' upcoming trial. This application was brought on a somewhat urgent basis on the Friday prior to the commencement of a jury trial the following week. The trial has been set for four weeks.
- [2] Though the Defendant did not file a Notice of Application, or an Application Record, no objection was raised by the Plaintiff on account of this. Furthermore, the parties agreed on what was in issue, and both parties were in a position to argue the matter fully. It is relevant that I have case-managed this action for more than three years. Accordingly, I have some sense of the underlying facts and of the legal issues that the trial will raise. Having said this, that understanding is relatively superficial. I do not have any real knowledge of what evidence will be led from different witnesses, nor, for example, have I seen any of the expert reports that the parties intend to rely on.
- [3] In the context of an application that deals with the admissibility of various documents on the basis, inter alia, that those documents are not relevant or that they are unnecessary because such evidence can be led through other witnesses, or that the documents contain opinion evidence in respect of which no notice was given and that will be the subject of other expert evidence, the Court is necessarily required to rely on the submissions of counsel without being in a position to test or weigh those submissions in any meaningful way.

- [4] Because relevance is necessarily defined by the pleadings that have been filed, it is necessary to review both the material facts that underlie the Plaintiff's claim and the legal issues that that claim raises. The facts and the description of the legal issues that follows is based on the pleadings and the trial briefs of the parties.
- [5] On December 7, 2012, the Plaintiff, an elderly woman, was assaulted in or near the Downtown Eastside of Vancouver by the third party, Mr. Osuteye. That assault caused the Plaintiff serious and permanent injuries. This is apparently not contested by the Defendant. Indeed the parties have resolved or agreed on the damages that arise from the Plaintiff's injuries. Accordingly, the jury will only be asked to address the liability of the Defendant.
- [6] It is common ground that Mr. Osuteye was involuntarily admitted to St. Paul's Hospital for acute psychosis the day before he assaulted the Plaintiff. He was, however, decertified following a psychiatric assessment by the Defendant. Mr. Osuteye was apparently first diagnosed with schizophrenia in or about 2008.
- [7] The claim against the Defendant is advanced in negligence and as a breach of her fiduciary duties and/or a breach of statutory duty. Some 20 different particulars of wrongdoing are alleged against the Defendant. The claim against the Defendant thus raises issues of duty of care, standard of care, and causation.
- [8] The parties agree and accept that the issue of whether the Defendant owed the Plaintiff a duty of care will be determined by the Court. The issue of whether the Defendant met the standard of care expected of her and whether the Plaintiff can establish causation will be left for the jury.
- [9] Importantly, the Plaintiff does not advance a claim as against Mr. Osuteye. Mr. Osuteye had originally been added as a third party to the action. In response to that third-party claim, he pleaded that he was, by reason of his mental state, incapable of forming the requisite intention for assault and/or for battery. It is common ground that Mr. Osuteye remains in the action as a declaratory third party for apportionment purposes only, if necessary. Nevertheless, Mr. Osuteye's ability to appreciate the nature and quality of his actions is an issue at trial. That issue is, again, to be determined by the jury.
- [10] Let me turn to the documents in issue. The Defendant objects to various categories of documents. I use the word "documents" broadly, and in the sense it is defined in R. 1-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [11] At the outset of the application, the number of documents that were in issue was larger. As each of counsel for the Plaintiff and counsel for the Defendant made their respective submissions, they accepted that they either did not require or alternatively had no objection to various documents. They further advised me that they expected to be able to resolve still other issues.

- [12] Ultimately, it is the following finite categories of documents that remain in issue. One such category of material was described before me as "External Review" evidence.
- [13] In early 2012, Vancouver Coastal Health and Providence Health Care appointed a review team to perform an emergency Mental Health Act, R.S.B.C. 1996, c. 288 "case external review". Dr. O'Shaughnessy was one of four appointees to the independent review team. The Plaintiff seeks to call Dr. O'Shaughnessy as a "fact witness" in connection with the External Review.
- [14] The External Review was prompted by an incident involving a discharged patient in February 2012. The patient was a homeless man who was brought to St. Paul's by the Vancouver Police Department and who was discharged later that day. He then stabbed an elderly man in a nearby cafe less than a day later.
- [15] Following the investigation, the review team published a report in August 2012, or some four months before Mr. Osuteye's admission to St. Paul's. The Defendant was one of the physicians who was specifically identified as having been interviewed in the External Review. Counsel for the Plaintiff does not intend, she says, to admit the report into evidence for the purpose of the truth of any of the opinions stated therein, and the jury, she says, can be appropriately cautioned in that regard. Rather the report and Dr. O'Shaughnessy's evidence is "sought to be admitted for the fact that those comments were made and for the fact that the inquiry was undertaken including the content of the inquiry".
- [16] Counsel further argues that the External Review is relevant to the Court's analysis of whether a duty of care exists in this case because it focuses heavily on the relationship of proximity between the treatment providers at St. Paul's, an inner-city hospital, and the nearby Downtown Eastside community. The External Review expressly and repeatedly comments on the proximity of St. Paul's to the Downtown Eastside.
- [17] Second, counsel argues that the evidence also addresses the issue of standard of care and that it should not, accordingly, be withheld from the jury. The fact that the Defendant was interviewed by the review panel and that St. Paul's was implementing a system to ensure that all emergency psychiatric admissions receive comprehensive psychiatric assessments before discharge suggests, it is argued, that the Defendant had, or ought to have had, a heightened awareness of the risks associated with discharging a psychotic patient into the community. This heightened awareness in turn, it is argued, should be canvassed through the available evidence because it informs the adequacy of the care that the Defendant provided to Mr. Osuteye.
- [18] Counsel for the Defendant, in response, raises various concerns. He argues, for example, that it is irrelevant that another mentally unwell individual was discharged from St. Paul's and then went on to injure someone. He also argues that Dr. O'Shaughnessy was only one of the four authors of the joint report.

- [19] In the main, however, counsel argues that the report contains opinion evidence and that no notice under the Rules of such opinion evidence was provided to the Defendant. The Defendant is prepared to admit that a review was undertaken and that the Defendant was interviewed during that review but objects to any introduction of the contents of the External Review.
- [20] With this backdrop, it is relevant that the Plaintiff only seeks to admit 15 pages of the 47-page review. Those pages are interspersed throughout the report. It is those pages that I intend to focus on.
- [21] Before doing so, however, brief reference to the relevant legal framework for these issues is necessary. First, more than 35 years ago, the Court in *Graat v. The Queen*, [1982] 2 S.C.R. 819, all but did away with the distinction between fact and opinion where a witness's testimony was based on personal observation. Justice Dickson as he then was, said at 835:
- Except for the sake of convenience there is little, if any, virtue in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.
- [22] Justice Dickson continued and said at 836: "The witnesses had an opportunity for personal observation. They were in a position to give the Court real help."
- [23] At the same time, the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, stated in para. 1 that the Court "over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role". This has been done to "ensure that expert opinion evidence meets certain basic standards before it is admitted": *White Burgess* at para. 1.
- [24] This tightening of the rules of admissibility has also be undertaken to guard against those "special dangers" which may arise when expert evidence is allowed too easy an entry: *White Burgess* at paras. 1, 45.
- [25] Normally, courts use the framework established in *R. v. Mohan*, [1994] 2 S.C.R. 9 to determine whether expert evidence should be admitted. That framework considers: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of an exclusionary rule; and (4) whether the individual is a properly qualified expert. That analytical framework was further refined in *White Burgess* at paras. 18-24.
- [26] The third body of relevance jurisprudence pertains to the instructions that a court can provide to a jury either mid-trial or at the end of a trial. Generally speaking, and depending on the complexity of the instruction, courts have a reasonable level of confidence that juries will follow the instructions they have been provided: *Paskall v. Scheithauer*, 2014 BCCA 26 at para. 37; and *R. v. Khan*, 2001 SCC 86 at paras. 81-82.
- [27] With this backdrop, I turn to the portions of the External Review that are in issue.

- [28] Pages 3 and 4 of the External Review describe who was involved in the review and what further work was done by the review panel. Page 3 further describes the purpose of the review as being "to examine the current system with a view to providing recommendations and identifying improvements that support the provision of optimal care to persons with acute mental health and substance abuse service needs while ensuring public safety".
- [29] Other parts of these pages deal with the structure of the report. These pages do not contain opinion evidence. They are relevant or potentially relevant to both the question of duty of care and standard of care and provide evidence that a study was undertaken in relation, in part, to St. Paul's.
- [30] The last paragraph at page 4 is different. It expresses the review panel's conclusions or opinions. It is, I consider, opinion evidence in respect of which notice should have been provided, and, accordingly, it should not be provided to the jury.
- [31] Page 5 is the first of four pages of recommendations that were made in the External Review. It is not clear to me why the Plaintiff seeks to rely on page 5 alone. I was told, however, that these recommendations had not been implemented by December 2012 or when the Plaintiff was attacked.
- [32] Furthermore, I understand that the Plaintiff will not be arguing, for example, that the Defendant should have been following these various recommendations when she interacted with Mr. Osuteye. In such circumstances, I do not consider that page 5 of the External Review serves any useful purpose and I do not consider it should be admitted into evidence.
- [33] Page 10 of the External Review addresses various issues. It identifies that individuals with mental illnesses concurrent with substance abuse difficulties result in repeated behavioural crises, frequent police interactions, and involvement with multiple mental health agencies and systems. This strikes me as a self-evident proposition that requires limited, if any, expertise and is not objectionable.
- [34] Other parts of page 10, however, deal with psychiatric risk assessments and express conclusions that rely on the various studies that the authors refer to. Such information can be led through an expert's opinion. It would not be appropriate, however, to lead that evidence through Dr. O'Shaughnessy in this context.
- [35] The Plaintiff is particularly focussed on including or on introducing a statement from page 10 that states: "Vancouver is exceptional in having individuals with mental illnesses, substance abuse and homelessness concentrated in a very small geographical area--the Downtown Eastside."

- [36] It is not clear to me what the source of that information is. If Dr. O'Shaughnessy had lived or worked in other major Canadian cities such as Toronto or Calgary, he may well have the personal experience or formed the observations on which he could reasonably base this statement. If, however, the statement is based on what Dr. O'Shaughnessy has read or been told or on his research, it would not be admissible. Accordingly, counsel would have to establish an adequate foundation before being able to introduce this evidence.
- [37] Pages 13 to 15 of the External Review deal primarily with St. Paul's, its personnel and patient base, its physical plant, its model of care, and Vancouver's various psychiatric acute care services. This evidence is overwhelmingly descriptive. It describes, for example, the number of beds for psychiatric patients at each of Vancouver General Hospital and St. Paul's. It describes the area where psychiatric rooms are located. The External Review confirms that St. Paul's receives the majority of patients in crisis from the Downtown Eastside. This evidence does not advance an opinion. It also deals with facts that are likely known to any nurse, intern or physician who works at St. Paul's as well as to both the police officers and ambulance workers who interact with St. Paul's.
- [38] There are, however, some passages within these pages that do reflect recommendations or opinions. In addition, there are some passages that refer to and rely on other studies. Such evidence, subject to certain safeguards, can generally be relied on by an expert. I consider that it would be wrong, however, to introduce such evidence through Dr. O'Shaughnessy. I have accordingly redacted certain passages from pages 13 to 15 and I have provided duplicate pages that reflect that exercise to counsel.
- [39] Pages 32 to 33 of the External Review reflect the conclusions that were derived from interviewing two facilitated focus groups. These groups were made up of either individuals with mental illnesses or of the family members of individuals with mental illnesses. These two groups then expressed various concerns of various kinds. Their concerns give rise, at page 33 of the External Review, to several further recommendations.
- [40] Experts are often permitted to introduce survey and other evidence of a similar nature which would otherwise be considered hearsay: S.N. Lederman, A.W. Bryant and M.K. Fuerst, Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018) at §§12.220-12.223.
- [41] In this instance, Dr. O'Shaughnessy is not a properly qualified expert. Accordingly, I do not consider that the various concerns and grievances of these two groups can properly be led by the Plaintiff through the evidence of Dr. O'Shaughnessy.
- [42] Page 35 of the External Review expresses various opinions that are based on various studies. Other portions of the page reflect the contents of interviews with third parties. Once again, such evidence cannot generally be introduced by an individual who has not been qualified as an expert, and, accordingly, I do not consider that page 35 of the External Review is admissible.

- [43] Pages 40 to 41 contain a list of the individuals, including the Defendant, and of the groups who were interviewed for the External Review. It does not contain any opinion evidence. The evidence is relevant because it speaks to the relative seriousness of the undertaking and to the work that was done by the review panel. To the extent these pages have any prejudicial effect, I consider that that prejudicial effect is outweighed by their probative value. Accordingly, I that consider these pages are admissible.
- [44] Next, I turn to the second category of evidence in issue. That evidence was described before me as "scene evidence". Initially, in the written briefs of counsel, this included the eyewitness evidence of two individuals who observed the attack on the Plaintiff and who thereafter observed Mr. Osuteye's further conduct.
- [45] Before me, however, these objections were limited to the audio recordings of the 9-1-1 calls these two individuals made to the police, to a single photo and to certain records that described the actual injuries that were suffered by the four individuals who were attacked by Mr. Osuteye in a relatively short period. I will address each of those pieces of evidence in turn.
- [46] The 9-1-1 calls that were made by the two individuals who saw the Plaintiff being attacked and who then called the police (the "9-1-1 Evidence") were played for me. Though I did not time the length of those recordings, I would estimate that each is perhaps one to a few minutes in length.
- [47] It is clear from the tenor and language of the recordings that the callers are distressed by the violence of the events they are witnessing and that they are afraid to intervene. The Defendants object to the 9-1-1 Evidence in part because they say it is irrelevant and in part because they say its prejudicial effect outweighs its probative value.
- [48] There is a considerable body of case law that deals with the admissibility of such evidence. Much of this law deals with the hearsay nature of such evidence and the circumstances in which it is properly admissible: *R. v. Powers*, 2016 BCSC 2605 at para. 5; and *R. v. Sylvain*, 2014 ABCA 153 at paras. 30-33. These and other cases deal with the traditional *res gestae* exception to the admissibility of hearsay and to what properly constitutes an excited or spontaneous utterance.
- [49] There are other cases that recognize that 9-1-1 evidence can, depending on the circumstances, constitute a prior consistent statement and they address the issue through that lens; *Sylvain* at paras. 74-79.
- [50] These are not the issues before me. Counsel for the Defendants does not object to the 9-1-1 Evidence on these various bases, but rather he does so on the specific grounds that I have identified.

- [51] I am satisfied that the 9-1-1 Evidence is relevant. A central issue at trial will be whether Mr. Osuteye was, at the time of the Plaintiff's attack, capable of the intent to assault a person: *Lawson v. Wellesley Hospital* (1975), 61 D.L.R. (3d) 445 (O.N.C.A.) at 450, aff'd on other grounds [1978] 1 S.C.R. 893. That issue, in turn, is related to whether Mr. Osuteye was able to appreciate the nature and quality of his actions: *Cooper v. The Queen*, [1980] 1 S.C.R. 1149; and *Kjeldsen v. The Queen*, [1981] 2 S.C.R. 617.
- [52] The Defendants also argued that the eyewitness evidence and 9-1-1 Evidence relates to Mr. Osuteye's actions and not to his mental state.
- [53] I do not agree. The nature and violence of Mr. Osuteye's conduct can provide a jury with direct and circumstantial evidence from which they can draw inferences or arrive at conclusions. In this case, Mr. Osuteye attacked four people in a very short period. I understand he caused three of them serious injury. He then stripped to his underwear. And he thereafter interacted calmly with the police when they arrived. All of this evidence is potentially relevant to Mr. Osuteye's perceived condition at the relevant time.
- [54] Counsel for the Defendants further argue that a description of Mr. Osuteye's actions can be introduced through the viva voce evidence of the eyewitnesses who made the 9-1-1 calls and that the 9-1-1 Evidence is unnecessarily inflammatory. Once again, I do not agree.
- [55] The Plaintiff has no memory of her attack. I believe or understand that the police arrived after Mr. Osuteye had stopped striking or kicking the Plaintiff. Though the two eyewitnesses can describe what they saw, now nearly seven years ago, that evidence is not likely to fully or accurately convey what they perceived at the time.
- [56] The description of a scene is not generally as useful as a picture of that scene. The description of a sound is not the same as a recording of that sound. In this case, I believe that the 9-1-1 Evidence adds texture and content to what the eyewitnesses observed. In both *Sylvain* at para. 43 and *R. v. Dessouza*, 2012 ONSC 210 at para. 35, the Courts were satisfied that the 9-1-1 evidence provided a better and more demonstrative recounting of what had occurred than did the callers' evidence. Both cases concluded that the 9-1-1 evidence provided better evidence of the witness' heightened emotional distress. Both cases dealt with 9-1-1 calls from a complainant in a sexual assault and, to that extent, the cases are different.
- [57] In *Powers*, a witness gave evidence at trial and she had made a 9-1-1 call as the accused, who was the witness's ex-spouse, attempted to enter her home. The accused was charged with breaking and entering the home. Justice Griffin, as she then was, said:
- [9] I find that the recording of the 911 call is relevant to show Ms. Cunningham's demeanour and emotional state and the narrative context of events as they unfolded. I disagree with the defence that these things are not relevant.

- [10] The 911 recording is also real evidence of what, in fact, Ms. Cunningham was saying. For example, "please leave, please get out, please go, you're really making me afraid" and "please stop". It is evidence of the fact she was stating these things at the time. On the break and enter offence, this goes to the question of whether the accused was invited into the house or was denied entry into the house and forced his way in. It is not enough for the defence to submit that if the accused testifies, he is unlikely to take issue with the fact that he broke into the house. The Crown is permitted to prove this necessary element as part of its case.
- [11] The only real prejudice identified by the defence is that the call is inflammatory. The point of this complaint seems to be that it illustrates how upset Ms. Cunningham was as events unfolded, but the fact it captures events as they unfolded as opposed to being a description of events after the fact is why it is so probative. In my view, the probative value of the evidence outweighs any prejudicial effect.
- [58] Once again, the Court in Powers dealt with circumstances that are different from those raised in this case.
- [59] Nevertheless, for the reasons I have described, I consider that the obvious distress of the witnesses to the Plaintiff's attack can inform the violent nature and potentially the irrationality of that attack and Mr. Osuteye's subsequent behaviour.
- [60] In addition, I was informed by counsel for the Plaintiff that there were ten witnesses to the Plaintiff's attacks and that there were ten 9-1-1 calls, although I did not understand counsel to be giving me a precise number in either instance. The point is that the Plaintiff, in seeking to introduce the 9-1-1 Evidence from two such witnesses, does not seek to inflame the jury or to prejudice the Defendants. Nor has counsel for the Plaintiff chosen the most graphic or descriptive of the 9-1-1 calls that were made. I was advised that in one such call that was not chosen, the caller, in describing Mr. Osuteye's attack on the plaintiff, said "he kicked her head like a soccer ball".
- [61] The 9-1-1 Evidence, though frantic and panicky in tenor, does not use such language. The object of the 9-1-1 Evidence is not to exaggerate the evidence of the Plaintiff's attack nor, conversely, to dilute or sanitize that evidence. Rather it is to provide the trier of fact with both a full and accurate description and sense of what took place. Accordingly, I consider the 9-1-1 Evidence is admissible.
- [62] Next, the Defendant objects to a single photograph of Mr. Osuteye in his underwear. It appears the photograph was taken at a police station. The Defendant again argues that this photograph is inflammatory and unnecessary. I do not agree. It is a single photograph out of many such photographs. There is nothing in the photograph that is exaggerated or distressing or otherwise inflammatory. It allows the jury to not only hear a description of how Mr. Osuteye was dressed after he attacked the Plaintiff but to fix that image accurately. The photograph is admissible.

- [63] Next, the Defendant objects to any description of the injuries of the persons that Mr. Osuteye attacked. More precisely, counsel for the Defendant accepts that the Plaintiff can properly lead a description of the various injuries that the Plaintiff suffered when she was attacked. He objects, however, to any such description of the injuries of the other persons that Mr. Osuteye attacked in the minutes before his attack on the Plaintiff. He does so on the basis; (1) that such evidence is irrelevant; (2) such evidence is inflammatory; and (3) such evidence may be used by the jury improperly as hindsight evidence when weighing or assessing the conduct of the Defendant. I disagree with all three points.
- [64] I consider that the nature and extent of the injuries of the persons who Mr. Osuteye attacked to be relevant to his state of mind during the attacks and, in particular, to when he attacked the Plaintiff. To be clear, he did not push or strike these individuals. Instead, I am told that he kicked them in the head repeatedly and that he then he jumped on their torsos. The violence of a series of attacks on unknown persons within a short period of time, and the severity of their ensuing injuries can reasonably, in combination with other direct and circumstantial evidence, provide a jury with a basis to draw inferences or make findings in relation to Mr. Osuteye's state of mind. That conduct and the harm that ensued is relevant.
- [65] I also do not consider that a concise but accurate description of each victim's physical injuries is inflammatory. If the Plaintiff sought to repeat or revisit that evidence through different witnesses, I would come to a different conclusion.
- [66] Conversely, to describe the injuries of these other victims in generic terms as for example "serious" or "extremely serious" would be both ambiguous and unnecessarily sterile.
- [67] Finally, I do accept that there is some risk the jury might misuse such evidence. I consider that that risk can be fully and adequately addressed in my charge or in a mid-trial instruction when the evidence is led or both. I intend to canvas this issue further with counsel as the trial proceeds.

"Voith J."

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