

CANADA / JUDGMENT

Dinnissen v. Lee

2018 BCSC 2233

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2018 BCSC 2233 Dinnissen v. Lee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dinnissen v. Lee,

2018 BCSC 2233

Date: 20181213

Docket: M155190

Registry: Vancouver

Between:

Julie Dinnissen

Plaintiff

And

Wai Tun Maggie Lee

Defendant

Before: The Honourable Mr. Justice Funt

Ruling on Admissibility of Expert Report

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Place and Dates of Trial:

Vancouver, B.C.

November 26-30,

December 3-7, 10, 11, 12, 13, 2018

Place and Date of Ruling:

Vancouver, B.C.

December 13, 2018

INTRODUCTION

- [1] Dr. David A. Brooks is a medical doctor specializing in occupational medicine. In that capacity, he has been qualified in the current proceedings as "capable of providing expert opinion evidence with respect to the diagnosis, prognosis, rehabilitation, and functional and occupational, vocational and avocational consequences and impairment of traumatic brain injury, orthopaedic injury, musculoskeletal injury, and psychological injury".
- [2] The defendant argues that Dr. Brooks's expert evidence (including his June 6, 2018 report) should be ruled inadmissible.
- [3] In *R. v. Mohan*, [1994] 2 S.C.R. 9, Justice Sopinka, writing for the Supreme Court of Canada, set forth the criteria for the admission of expert evidence. Justice Sopinka stated:
- [17] Admission of expert evidence depends on the application of the following criteria:
- (a) relevance;
 - (b) necessity in assisting the trier of fact;
 - (c) the absence of any exclusionary rule;
 - (d) a properly qualified expert.
- [4] In the case at bar, as noted, Dr. Brooks is a properly qualified expert.
- [5] The key issues are whether the criteria of relevance and necessity were satisfied. For the reasons that follow, I find that neither of these two criteria are satisfied. Accordingly, the Court will not admit Dr. Brooks's June 6, 2018 report into evidence as an expert report or receive expert testimony from Dr. Brooks in relation to the plaintiff's condition.

LAW

- [6] In *Mohan*, Justice Sopinka, with respect to the criteria of relevance stated at paras. 18 to 25:

(a) Relevance

[18] Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See McCormick on Evidence, 3rd ed., at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

[19] There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. As La Forest J. stated in *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science". The application of this principle can be seen in cases such as *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348, in which Moldaver J. applied a threshold test of reliability to what he described, at p. 353, as "a new scientific technique or body of scientific knowledge". Moldaver J. also mentioned two other factors, inter alia, which should be considered in such circumstances (at p. 353):

- (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
- (2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

(b) Necessity in Assisting the Trier of Fact

[21] In *R. v. Abbey*, [[1982] 2 S.C.R. 24], Dickson J., as he then was, stated, at p. 42:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" ([Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)

[22] This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, supra. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". More recently, in *R. v. Lavallee*, [[1990], 1 S.C.R. 852] the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

[23] As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in *R. v. Turner*, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699, at p. 718:

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.

[24] There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

[25] These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue. Expert evidence as to credibility or oath-helping has been excluded on this basis. See *R. v. Marquard*, [1993] 4 S.C.R. 223, per McLachlin J.

[7] With respect to the necessity criteria, Sopinka, Lederman & Bryant's *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018) states as follows:

§12.74 The courts must distinguish between expert evidence which is necessary to assist the trier of fact from opinion evidence which is superficially attractive but, on closer examination, is misleading. Trial judges must assess expert evidence that has the potential to mislead or confuse the trier of fact, is superfluous and wastes time and judicial resources or unnecessarily encroaches on the province of the jury.

§12.75 There is no bright line to determine when a subject matter falls within the normal experience of a particular trier of fact or becomes common knowledge thereby rendering expert evidence unnecessary. In *R. v. F. (D.S.)*, O'Connor J.A. stated:

There is no exact way to draw the line between what is within the normal experience of a judge or a jury and what is not. The normal experiences of different triers of fact may differ. Over time the subject matters that come within the normal experiences of judges and juries may change. The normal experiences of those in one community may differ from those in other communities. In the end, the court in each case will be required to exercise its best judgment in deciding whether a particular subject matter is or is not within the normal experience of the trier of fact.

Thus, the trial judge, at the threshold stage, must determine whether the proffered expert evidence is necessary to assist the particular trier of fact understand the issues or whether the trier of fact is unlikely to form a correct judgment about the matter if unassisted by expert opinion evidence.

[Foot notes omitted.]

ANALYSIS

[8] I have considered the admissibility of Dr. Brooks's evidence as if I were sitting with a jury. If the evidence should not go to a jury, there is no reason it should be considered by me as the trier of fact. The rules of evidence should be consistent as between jury trials and trials by judge alone.

[9] In the case at bar, two particular observations are warranted.

[10] First, the plaintiff has the occupation of a kitchen and bath designer. The needs of such an occupation would be readily understood by a jury.

- [11] Second, the Court has, or is scheduled to have, expert medical evidence from the plaintiff's general physician, her psychologist, and a neuropsychologist, an orthopaedic surgeon, two neurologists, and two psychiatrists.
- [12] In general terms, the Court must ask: Will Dr. Brooks's evidence assist the trier of fact? Will it involve "an inordinate amount of time which is not commensurate with its value"?
- [13] In his medical-legal report, Dr. Brooks summarizes his opinion as follows:

SUMMARY OF OPINION

1. It is my opinion that Ms. Dinnissen sustained a complicated mild traumatic brain injury (mTBI), musculoskeletal injuries, including a left wrist fracture, in the motor vehicle versus pedestrian accident on September 20, 2013. Since that time, she has been complaining of cognitive disturbances and particularly ongoing fatigue. She has some residual left wrist pain, especially with use.
2. Ms. Dinnissen's primary current diagnosis would be best designated as post-concussion syndrome (PCS). It is a term used to describe a constellation of nonspecific symptoms (e.g., headache, fatigue, sleep disturbance, vertigo, irritability, anxiety, depression, apathy, and difficulty with concentration and exercise). Ms. Dinnissen primarily reports chronic fatigue. Recent research demonstrates anatomical and functional changes in the brain of these individuals. She does have findings on follow-up MRI scan of left temporal lobe volume loss and hemosiderin deposition in this are indicative of permanent brain injury.
3. Due to her ongoing symptoms, she has limitations in her ability to perform her work as a kitchen and bath designer as effectively as she did pre-accident. She has reduced cognitive efficiency and fatigue that impact on her work function and capacity.
4. Due to Ms. Dinnissen's ongoing impairments persisting symptoms 41/2 years post injury it is very likely her limitations are permanent and she is unlikely to experience significant further recovery. She may show some minor improvements in specific areas with further treatments but overall she would be considered at maximal medical recovery. Most brain injuries are considered to have reached maximal medical recovery after 2 years.
5. Ms. Dinnissen also sustained a fracture of the left wrist that involved the joint surfaces and therefore is at increased risk of degenerative post-traumatic arthritis in this joint. She may experience increased pain levels overtime and as a consequence of the arthritic changes may have reduced wrist and hand function and also may need future surgery on this joint.
6. It is my opinion that Ms. Dinnissen's current complaints and limitations related to fatigue, cognitive impairments and her left wrist pain are solely the consequence of the motor vehicle accident of September 20, 2013.

7. As a result of her ongoing cognitive impairments, fatigue, musculoskeletal symptoms, and functional impairments she has significantly decreased ability to participate as fully in occupational, personal, social and recreational activities as pre-accident and her injuries have significantly impacted her quality of life.
8. Ms. Dinnissen currently appears employable as a kitchen and bath designer although at a reduced level of work efficiency and capacity compared to pre-accident. She has a supportive employer but she may not receive the same accommodation in a different job and therefore her future competitive employability would be considered permanently reduced.
- [14] With respect, none of the opinions in Dr. Brooks's report will assist the trier of fact. The opinions either duplicate or are secondary to the opinions of other experts (for example, neurologists) or are related to matters capable of being understood by the trier of fact without the help of an expert (for example, the occupational requirements of a kitchen and bath designer.) In short, Dr. Brooks's testimony will not assist the trier of fact.
- [15] Counsel for the defendant described Dr. Brooks's report as lengthy and cumbersome. I agree. For example, paragraphs 56 to 61 read:
 56. It is clear from the medical literature and clinical experience that each MTBI places unique stress and strain on the brain. Recent research has attempted to explain anatomically, functionally and neurophysiologically the mechanisms behind various persistent PCS problems. Research by Chen using functional imaging showed that a group of injured individuals, none of whom were undergoing litigation, showed normal resting PET (positron emission tomography) scans compared to controls. However, when these individuals were given a complex memory task they were found to have differences in regional cerebral blood flow in the prefrontal cortex. In other words, complex cognitive demands lead to abnormal brain responses. This can help explain why individuals become cognitively and physically fatigued with work tasks. Similarly, an MRI study of concussed NHL hockey players showed that even months after their injury those with persistent PCS demonstrate differences from controls in activation of memory areas in the structural MRI findings: all symptomatic concussed athletes initially showed atypical brain activation patterns in the dorsolateral prefrontal cortex. [3]
 57. Cognitive deficits are common following TBI and contribute significantly to disability. The frontal lobes and their related circuitry are particularly vulnerable to traumatic dysfunction can profoundly impact patients' quality of life, as these cognitive skills are implicated in job performance, social relationships, and activities of daily living. [4] The clinical features of post-concussive syndrome often mirror those of frontal and temporal lobe syndromes, including problems with executive function and difficulties with attention, memory, and concentration. Frontal and temporal lobe damage has been shown in neuropathological and imaging studies. Investigators of studies using diffusion tensor imaging (DTI) to assess microstructural white matter changes in mild TBI identified a high prevalence of injury in

the frontal lobes, corpus callosum, and corona radiata, and diffusely in deep white matter. [5] Ms. Dinnissen noted cognitive issues of memory and executive function shortly after the accident and had ongoing challenges with trying to return to work duties. Decreased speed of information processing is well reported after these injuries. The interruption of the integrity of the white matter pathways is one possible explanation. Long coursing axons are felt to be at higher risk of biomechanical deformation and interruption in such injuries, particularly interhemispheric connections. Therefore, the neuropsychological tasks that require these types of connections or multiple connections often show differences in the form of slowed responses in MTBI. [6] Research by Maruta et al found that for some patients, reduced cognitive efficiency and fatigability may represent key elements of interference when interacting with the environment, leading to varied paths of recovery after a concussion. [7] More recent research from Mankelow et al in 2017 showed that [M]TBI significantly reduces the levels of activation and connectivity strength between key areas of the working memory network. [8]

58. Ms. Dinnissen reports she has ongoing cognitive symptoms including reduced concentration, memory efficiency and word finding difficulties. Word finding difficulties have been studied in post-concussion syndrome and Crawford's research showed that the word retrieval difficulties related mainly to generalized cognitive slowing rather than a focal neurological defect. [9]
59. Research by Roe et al found in a population with PCS that cognitive symptoms dominated, particularly at the 1 year follow up post injury. [10] A 2009 study by Smits using functional MRI and standard neuropsychology tests showed challenges at higher memory demands on the normal working memory pathways and patients with post-concussion syndrome demonstrated use of alternative pathways in the brain likely as compensation. [11] Several other studies have demonstrated similar findings [3, 12]. Functional MRI may be more sensitive to altered brain function in these individuals but is not widely available clinically to date but provide evidence to support an ongoing disturbance.
60. The same authors in another study used multimodal imaging and showed alterations in how attention and working memory were processed in PCS. [13] They concluded, "These data suggest that the top-down attentional regulation and deactivation of task-irrelevant areas may be compensating for the reduction in working memory capacity and variation in white matter transmission caused by the structural and metabolic changes after injury. This may in turn be contributing to secondary PCS symptoms such as fatigue and headache".
61. Additional evidence comes from recent electrophysiological imaging by Ledwidge et al [14] who proposed that that individuals with a past concussion recruit compensatory neural resources in order to meet executive functioning demands. Their study subjects showed increased electrical activity in one part of their subjects brains compared to controls despite being 4 years or more post-injury. Mahar and Fraser stated in their article that "disruption of cognitive functioning is irrefutably the primary deficit following most forms of brain injury." [15]

[Italics and underlining in original, footnotes omitted.]

- [16] In my view, Dr. Brooks's report is not sufficiently focused to assist the trier of fact. It surveys some of the medical literature without a specific analysis of the plaintiff's symptoms and conditions that she presents or reports in the context of her occupation. The form of the report unavoidably invites a lengthy and likely unweildy cross-examination. In short, allowing Dr. Brooks to testify with respect to his report would involve "an inordinate amount of time which is not commensurate with its value".
- [17] In sum, the occupational requirements of a kitchen and bath designer do not require medical knowledge, Dr. Brooks's opinions either duplicate or are secondary to the opinions of other experts, and his report's cumbersome nature would not assist the trier of fact.
- [18] The Mohan criteria of relevance and necessity are not met.
- [19] For completeness, I have not addressed the criteria of the absence of an exclusionary rule because it is clearly not engaged in the matter at bar.

CONCLUSION

- [20] The Court grants the defendant's application to exclude Dr. Brooks's expert report and testimony. The trial will proceed with the plaintiff's further witnesses.
- [21] I wish to emphasize that my ruling is limited to the particular case at bar and the form of Dr. Brooks's report in the context of this trial. Dr. Brooks is a medical doctor with particular expertise in the area of occupational medicine. He has assisted the Court as an expert on other occasions.

"Funt J."

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