
CANADA / JUDGMENT

Egli et al v. Egli et al

2003 BCSC 1716

COURT

Supreme Court of British Columbia

DECIDED

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2003BCSC1716

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Egli et al v. Egli et al,

2003 BCSC 1716

Date: 20031113

Docket: 22283

Registry: Penticton

Ruling on the Admissibility of the Penticton Mental Health Centre Records

Between:

Hans Egli by his Committee,

The Public Guardian and Trustee of British Columbia

Plaintiff

And

David Egli and Judy Egli

Defendants

Before: The Honourable Madam Justice Garson

Counsel for the plaintiff

C. Herb-Kelly

The defendants, David Egli and Judy Egli appearing in person

Date and Place of Trial:

September 29-30 and

October 1, 2003

Penticton, B.C.

Introduction

[1] This is a ruling on the admissibility of the records of the Penticton Mental Health Centre (the "PMHC records") concerning Hans Egli. The records have been tendered as an exhibit by the plaintiff, the Public Guardian and Trustee of British Columbia ("PGT"), as business records under the common law exception to the hearsay rule (*Ares v. Venner* (1970), 14 D.L.R. (3d) 4) for the purpose of proving the truth of the opinions asserted in the records. I admitted the records as business records for the purpose of proving the factual record of the various communications and contacts the Penticton Mental Health Centre had concerning Hans Egli. I reserved my ruling on the question of whether the PMHC records should be admitted for the purpose of proving the truth of the various opinions contained in the Records as to the mental status of Hans Egli. The parties have made written submissions. This is that ruling.

Background

[2] In this case the PGT, as the committee of Hans Egli, sues David and Judy Egli. Hans Egli is the elderly father of David Egli. The PGT seeks to set aside two sets of transactions, which occurred in 1998 and 1999, whereby David Egli, acting as his father's power of attorney, transferred certain investment accounts and property to himself. The PGT says that by virtue of a certificate of incompetency it obtained on April 12, 2001, the impugned transactions are void pursuant to s. 20 of the Patients Property Act, R.S.B.C. 1996, c. 349. David and Judy Elgi say that the evidence adduced in this trial rebuts the presumption under s. 20 that the transactions are void. The defendants contend that the transactions were done in furtherance of Hans Egli's stated wishes to benefit his children and grandchildren and that at the time of the transactions Hans Egli was competent to make the necessary decisions. The mental competence of Hans Egli in the years 1998 and 1999 is directly in issue. Because Hans Egli is now diagnosed with Alzheimer's disease or dementia, which are progressive diseases, his mental competence in the several years preceding the dates of the impugned transactions is also relevant.

[3] David and Judy Egli do not dispute that Hans Egli was incompetent at the time he was so certified on April 12, 2001, but they dispute that he was incompetent at the time the impugned transactions were made.

[4] The PGT tenders the PMHC Records in proof of the incompetence of Hans Egli at and before the dates of the impugned transactions.

Contents of the Records

- [5] The records contain assessments conducted by a team of professionals that resulted in the certificate of incompetence dated April 12, 2001. Because David and Judy Egli do not dispute that Hans Egli was incompetent at April 12, 2001, the records supporting that assessment are not in issue and in any event Paulette Sailes, the mental health assessor who signed the certification, did testify about her opinion at the trial.
- [6] A chronological review of the PMHC records reveals that they include the following opinions:

February 2, 1994, referral and assessment. This form includes under the heading Reason For Referral, a note which says "Suspected early Korzikoff's Syndrome. MMS 17/30." In other evidence at the trial it was explained that MMS means "mini-mental status exam."

February 17, 1994, letter from Stephen D. Morgan M.S.W. to Dr. Partridge with attached assessment of Hans Egli's mental status including the working papers of the mental status examination. Mr. Morgan did not testify and there is no evidence as to his qualifications other than the initials following his name which I take to be a Masters of Social Work degree. His assessment includes the following:

Mental Status Examination: Mr. Hans Egli's appearance and attitude in the interview were within normal limits. His clothing seemed clean and well matched. His cognitive functioning showed some deficits in short term memory and he was quite confused as to time. He completed a Mini Mental State Examination and scored 22 out of 30. Specific deficits were in the area of orientation to time again, and recall was also inhibited. Basically within the interview this client displayed a pattern of mild to moderate cognitive impairment. Etiology is unknown.

Postulative Diagnosis:

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Axis IV: Cognitive Deterioration, NYD

Axis IV: Severity of psychosocial stress: Code 2 (mild) to Code 3 (Moderate). This client is considering relocating his residence.

Axis V: Global assessment of functioning Scale: Code 60 At best in past year: Code 65.

August 29, 1995, (date unclear) referral and assessment form. This form includes a note "Alz. Type Dementia -/30. (A portion of the records has been cut off in reproduction)

January 31, 1996, assessment of Hans Egli's mental status again prepared by Stephen D. Morgan with covering letter to Dr. Thomson. This assessment includes the statement that Hans Egli "scored 22/30 on the Mini Mental State examination Axis V: Global assessment of functioning: Currently Code 55"

August 16, 1999, referral form - Elderly Outreach Program. Medical Factors - dementia.

August 16, 1999, referral form - "Suspected early Korsakoff's syndrome, MMSE 17/30 Working
Diagnosis: Cognitive Impairment NYD"

September 20, 1999, termination summary prepared by Jeanne Tinning R.N. Community Nurse, Elderly Outreach Program. This assessment of Hans Egli's mental status includes a "Diagnostic Formulation: DSM 1V [the Psychiatric diagnostic manual]."

- [7] The balance of the records relate to assessments following the dates that are in issue. I have not reproduced all the statements in the records that could be construed as opinions.

Analysis

- [8] The PGT argues that the PMHC records are largely observations and to the extent that the records contain opinions they are the sort of opinions which should be admitted under the common law exception to the hearsay rule in *Ares v. Venner*.
- [9] The PGT says that the PMHC records document observations about Hans Egli's declining capacity to function for several years prior to August 1998, the date of the first impugned transaction.
- [10] The plaintiff argues that if these statements are opinion, they are equivalent to the kind of opinion that was admitted in *Ares v. Venner*. Sopinka J., in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) stated that *Ares v. Venner* sanctions the admissibility of records that contain diagnoses as long as they fall within the declarant's normal scope of duty (at 195).
- [11] I will first examine the case law which in following *Ares v. Venner* developed an apparent distinction between somewhat mechanical observations which are admissible under *Ares v. Venner*, compared to more subjective opinions, such as psychiatric opinions, which are not admissible as business records. Second, I examine the authorities in which some courts have preferred to treat the issue not as an admissibility question but a question of weight. Lastly, I examine the relationship between the *Ares v. Venner* exception and Rule 40A, which governs the notice requirements for the introduction of opinion evidence.

Do opinions such as those contained in the PMHC records fall under the *Ares v. Venner* exception?

- [12] There are instances in which courts have admitted records containing clinical diagnoses for the truth of their contents. For example, in *Kozmeniuk v. Zellers Inc.* (2001), 202 Sask. R. 273, 2001 SKQB 114 the Saskatchewan Court of Queen's Bench admitted a doctor's report containing a diagnosis of chronic pain and ankle dysfunction. Similarly, in *Mastrangelo (Litigation Guardian of) v. Kitney* (1992), 16 C.P.C. (3d) 262 (Ont. Ct. (Gen. Div.)), a diagnosis recorded by a chiropractor was admitted, despite the plaintiff's argument to the effect that the record was not a business record because it expressed a diagnostic opinion. In making this argument, the plaintiff relied on *Adderly v. Bremner*, [1968] 1 O.R. 621. The trial judge, however, noted that in *Ares v. Venner*, which was decided after *Adderly*, the Supreme Court

of Canada admitted the nurses' subjective observations. The Court therefore admitted the chiropractor's diagnosis.

- [13] These authorities suggest that the opinions contained in the PMHC records may be admissible under the *Ares v. Venner* exception. However, there are other lines of authority that suggest the opposite view and which I find more persuasive.
- [14] In *R. v. West* (2001), 45 C.R. (5th) 307 (Ont. Sup. Ct. Jus.) Hill J. suggests that opinions are on a continuum -- at one end are opinions like those of the nurses in *Ares v. Venner*, and at the other are expert opinions that may not be admissible insofar as their prejudicial effect may outweigh their probative value. This view is reflected in the following comment by Hill J at ¶ 63-4:

There is of course a continuum of subjective opinionism with observations positioned at one end and conclusions clearly steeped in expert skills at the other. In some instances, observations of the expert declarant, while informed by a measure of special knowledge or expertise, are arguably little more than the expression of opinion permitted by a lay witness *Ares v. Venner*, *supra* (skin colour and relative temperature of skin); *H.S.*, *supra* (emotional condition of patient); *Regina v. Skrzydlewski*, *supra* (observations of patient behaviour); *Conley v. Conley*, *supra* (physical movements of subjects and opportunity for togetherness). On the other hand, some opinion statements are almost wholly the product of application of specialized skill and experience as in the hard science of forensic pathology:

It may be that, in a given case, the novelty of the science at issue, the high degree of subjectivism as in psychiatric assessment, or the centrality of the hearsay opinion to the ultimate issue in the proceeding, will attract application of the court's residual discretion to exclude evidence whose prejudicial effect outstrips its probative value: *McCormick on Evidence*, *supra* at page 266, s. 293.

- [15] In this case, although the science used to formulate the opinions is not novel, there is arguably a high degree of subjectivity involved in assessing a person's mental competence. Also, the opinions in the PMHC records are central to the ultimate issue in this proceeding. Furthermore, although the expertise of the record keeper was not enumerated as a factor in the *West* case, it would seem that there is at least an issue as to the expertise and qualifications of the record keepers in the PMHC records. The absence of evidence as to the qualifications of the record keeper may increase the prejudicial effect of the opinions.
- [16] Douglas Ewart in *Documentary Evidence in Canada* (Agincourt Ont.: Carswell, 1984), described the nurse's records admitted in *Ares v. Venner* as follows:

To some extent these could be said to be opinions, since they dealt with observations of colour and temperature. However, it should first be noted that the "opinions" were far from scientific or technical; indeed they seem much better characterized as observations rather than as opinions indeed, the Supreme Court of Canada in *Davie Shipbuilding Ltd. v. Cargill Grain Ltd.* seems to have interpreted the notes in *Ares* as dealing with observations rather than opinions. Further, and more significantly, the Court in *Davie Shipbuilding* excluded a document because it consisted

of unsubstantiated conclusions, rather than facts. It would seem to be inescapable that opinions are in the same class as conclusions, and are therefore not admissible under this exception to the hearsay rule.

- [17] Ewart clearly sees a distinction between the observations injected with subjective interpretations that were admitted in *Ares v. Venner* and opinions that are of a scientific or technical nature. A similar distinction was made in *Greenwood v. Syncrude Canada Ltd.* (1998) 235 A.R. 141, 1998 ABQB 962 (Q.B.). In that case, the plaintiff applied to admit doctors' opinion letters into evidence under *Ares v. Venner* without calling the doctors as witnesses. The trial judge denied this application, saying that the medical opinions were not the sort of opinions that were admitted under *Ares v. Venner*, and because the opinions lacked reliability.
- [18] Another case that distinguishes between different types of opinions is *Spectra Architectural Group Ltd. v. St. Micheal's Extended Care Centre Society*, 2001 ABQB 957, in which the Court distinguished between opinions that amount to the recording of an observable fact and subjective opinions that result from a more involved process of review and deliberation.

Concerns as to weight

- [19] Another approach that some courts have taken is that expert opinion is admissible under *Ares v. Venner*, but that concerns about the reliability of such opinions go to weight.
- [20] For example, in *Catholic Children's Aid Society of Metropolitan Toronto v. M.M.*, [1981] O.J. No. 2078, the Ontario Provincial Court, Family Division, saw *Ares v. Venner* as allowing the Court the discretion to consider the probative value of the records in question (which contained opinions and diagnoses) "beyond their value as business records." At ¶ 27, the Court said that:

Any increase in their value or weight under the *Ares* doctrine would depend on a cautious search for circumstances that would tend to guarantee the trustworthiness of the hearsay and for circumstances that would suggest a practical necessity for a departure from the accepted standards of fairness which allow an opposing party to challenge and test allegations, perceptions and opinions by way of cross-examination.

With respect to the particular records admitted in the proceedings, the Court said, in part (at ¶31):

As opinions and impressions move from fairly straightforward observations such as the "blue toes" in *Ares* into the more esoteric realm of psychiatry the readiness to attach significant weight should be more restrained.

Having particular regard to the imperfect state of the science of Psychiatry, I do not think opinions, impressions, or diagnoses of a psychiatric nature generally lend themselves well to proof through the filing of hospital records.

- [21] The Alberta Court of Queen's Bench also addressed the issue of weight in *Lynch Estate v. Lynch Estate*, (1993) 138 A.R. 41 (Q.B.). There, the issue was the admissibility of a letter by a specialist indicating that the subject of an estate dispute was suffering from Alzheimer's disease. The Court admitted the letter into evidence under *Ares v. Venner* "as being an opinion available to other doctors." Picard J. however, highlighted the fact that there was no evidence before the court of the examination done by the doctor or the basis for his conclusions or his qualifications, as well as the fact that he was not cross-examined. Picard J. therefore concluded that "[a]s evidence, it has to be weighed with these limitations in mind."
- [22] The opinion evidence that the plaintiff is seeking to admit in this case suffers from similar limitations. The records contain very little description of the examinations the writers of the records conducted. Often the writers do not identify the bases for their diagnoses. There is no evidence concerning the qualifications of the authors. Therefore if the reasoning in *Lynch*, *supra*, (as well as *Catholic Children's Aid*, *supra*) were to be followed, very little weight would be given to the opinions contained in the records.

Rule 40A - Expert Evidence Rule

- [23] If evidence is found to be admissible under the *Ares v. Venner* exception, then it is treated as fact and its admissibility is not governed by the opinion evidence rules contained in Rule 40A. However, but clearly the *Ares v. Venner* exception cannot be used to circumvent the provisions of Rule 40A. In *Reid v. Balcaen*, 2003 BCSC 1533, Barrow J. refused to admit into evidence under s.51 of the Hospital Act, R.S.B.C. 1996, c. 200. a consultation report of a neurologist where the party tendering the records had not complied with Rule 40A but was tendering the report for the truth of the opinion contained in the report. Barrow J. said at ¶5:

For purposes of the present application, it is only necessary to consider the relationship between s. 51 of the Act and Rule 40A. I hold that, to the extent that hospital records contain expert opinion, s. 51 does not operate to render those opinions admissible in the absence of compliance with the requirements of Rule 40A. To do otherwise, it seems to me, would undermine the order that Rule 40A is intended to bring to the trial process.

Interpreting the section in the manner set out above is to interpret it in a manner that is consistent with the approach that has been taken by courts in this province to s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124, which deals with the admissibility of business records and is often relied upon to ground the admissibility of clinical records, a close cousin of hospital records. Although there are limitations or safeguards built into s. 42 of the Evidence Act that are not found in s. 51 of the Hospital Act (for example, the former section is limited to matters "in which direct oral evidence of a fact" would be admissible), there is no reason, particularly in light of the principled approach to hearsay evidence that has been endorsed by the Supreme Court of Canada, to approach these two sections differently.

In *McTavish v. MacGillivray* (18 July 1997), Vancouver Registry No. D944248 (B.C.S.C.), Burnyeat J. had occasion to consider s. 42 of the Evidence Act and its application to clinical records. He reviewed the rationale underlying the common law exception to the hearsay rule as defined by Mr. Justice Hall in *Ares v. Venner*, [1970] S.C.R. 608. In doing so, he noted that the foundation for that exception lay in the twin dictates of Wigmore that ground the principled approach to the hearsay rule that has been embraced by the Supreme Court of Canada. Those twin dictates are a circumstantial guarantee of trustworthiness and necessity. As to the relationship between the Rules and s. 42 of the Evidence Act, Burnyeat J. concluded at ¶ 11 that:

Section 42 should not be used to avoid the provisions of Rule 40A, especially where potential witnesses are otherwise available and the only "necessity" is that there has not been compliance with Rule 40A.

In my view, there is no reason to give s. 51 of the Hospital Act any different treatment than that accorded to s. 42 of the Evidence Act. Indeed, there are compelling reasons for treating them similarly.

[24] (See also *Baas v. Jellema*, 2000 BCCA 24; *Seaman v. Crook* (2003), 14 B.C.L.R. (4th) 132 (S.C.)).

[25] Nothing in *Ares v. Venner* detracts from the usual rule that Rule 40A must be complied with if the statement sought to be admitted is found to be an expert opinion. *Ares v. Venner* permits in limited circumstances the introduction of certain types of opinions as proof of a fact. In my view it is only limited types of opinions, more in the nature of observations, which fall into the *Ares v. Venner* exception, and outside the ambit of Rule 40A.

[26] In the case at bar the opinions sought to be admitted for the purpose of proving the truth of the opinions are not straightforward or mechanical observation. The opinions are psychiatric in nature. They are steeped in the expert skills of a geriatric mental health worker. They are not akin to observations such as "blue toes" in *Ares v. Venner*. The opinions as to Hans Egli's "global assessment of functioning," his scores on the various mini mental status exams, and the diagnoses of his cognitive functioning are subjective opinions, requiring review of information, interviews, and deliberation of the author of the opinions. I have heard no evidence concerning the qualifications of the individuals who made the diagnoses and cannot therefore assess the degree of reliability that should be ascribed to the opinions. The diagnoses and opinions are central to the very issues upon which this case will be decided. The opinions which the plaintiff wishes to rely upon are not so numerous that they ought to be admitted for practical and necessary reasons. Furthermore the diagnoses made in the records, such as the diagnostic criteria from the psychiatric manual DSM IV, contain technical language that requires explanation. I therefore conclude that the opinions must be tendered under Rule 40A and the appropriate notices given.

[27] Subsection 7 of Rule 40A, gives the Court discretion to order that a statement be admitted, even where it does not conform to the requirements listed under subsection 5. This is not an appropriate case to exercise such discretion. The opinions tendered are central to the issues in this case and the defendants are entitled to require the authors of those opinions to be

produced for cross-examination. Fairness dictates that the defendants be permitted the opportunity to cross-examine on the opinions and that the issue of admissibility not be ignored in favour of an argument based solely on the weight to be attributed to the PMHC records.

[28] Accordingly, I conclude that the statements of opinion contained in the Penticton Mental Health Centre records are not admissible for the purpose of proving the truth of the opinions as to Mr. Egli's mental status for the time period that is in issue.

"N. Garson, J."

The Honourable Madam Justice N. Garson

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