
CANADA / JUDGMENT

Friebel v. Omelchenko

2013 BCSC 951

COURT

Supreme Court of British Columbia

DECIDED

16 April 2013

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2013 BCSC 951 Friebel v. Omelchenko

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Friebel v. Omelchenko,

2013 BCSC 951

Date: 20130416

Docket: S129221

Registry: New Westminster

Between:

Wayne Friebel

Plaintiff

And

Dr. Victor V. Omelchenko

Defendant

Before: The Honourable Madam Justice Ker

Oral Ruling on Voir Dire

Counsel for the Plaintiff:

G. Pyper

Counsel for the Defendant:

M. Thomas

A. Atkinson

Place and Date of Hearing:

New Westminster, B.C.

April 16, 2013

Place and Date of Judgment:

New Westminster, B.C.

April 16, 2013

- [1] THE COURT: This ruling follows an application by the defence to limit the scope of the area of expertise for which Dr. John McNeill, one of the plaintiff's experts, is entitled to offer expert opinion evidence.

Introduction

- [2] The plaintiff, Mr. Wayne Friebe, is suing Dr. Victor Omelchenko for what he alleges is substandard treatment by Dr. Omelchenko, his general practitioner, in prescribing Ativan (also known as Lorazepam) to him on December 30, 2009 to assist him in withdrawing from alcohol abuse. Mr. Friebe is now a recovering alcoholic. At the time of the events in issue, Mr. Friebe was endeavouring to withdraw from his excessive use, and indeed abuse, of alcohol. Mr. Friebe was Dr. Omelchenko's patient and had, since May 29, 2009, been endeavouring to stop his abuse of alcohol.
- [3] December 30, 2009 was Mr. Friebe's third attempt at alcohol withdrawal under Dr. Omelchenko's care. On that day, he was given a further prescription for Ativan which he had been given in May and July of 2009. He was doing his alcohol withdrawal on an outpatient basis.
- [4] The medication that Dr. Omelchenko prescribed on December 30, 2009 gave Mr. Friebe access to a large number of 1 milligram Ativan tablets to be taken at roughly six hour intervals over the next three days.
- [5] Mr. Friebe says he followed the prescription instructions. He says he has no memory of what happened to him from approximately 7:00 p.m. December 31, 2009 through 6:00 p.m. January 1, 2010 save for two brief impressions of some sort of collision on January 1, 2010 and riding in a police vehicle on that same date.
- [6] On January 1, 2010, Mr. Friebe was involved in two or three motor vehicle accidents. The last one occurred at approximately 3:00 p.m. at the intersection of 130th Street and 68th Avenue in Surrey, B.C. He was arrested for impaired driving at that time, taken to a nearby Surrey RCMP Detachment, provided two breathalyzer samples, charged with impaired driving, and released at approximately 6:00 p.m. Given the course of events described, Mr. Friebe was also subject to a 90-day driving prohibition by the Superintendent of Motor

Vehicles.

Background and overview of Dr. McNeill

- [7] Plaintiff's counsel has called Dr. John McNeill as an expert in pharmacology. Dr. McNeill is a retired professor emeritus and former Dean of the UBC Faculty of Pharmaceutical Sciences. He retired in 2004. Dr. McNeill testified on a voir dire into his qualifications after argument had been heard about the scope of his expertise and how the defence sought to confine Dr. McNeill on the opinion he can provide in this case.
- [8] Dr. McNeill has written four reports dated February 1 and August 29, 2011, February 5 and March 20, 2013. The plaintiff has tendered all but the first report. As I understand it, the entirety of the February 1, 2011 report is contained in the August 29, 2011 report. As well, aspects of the February 1, 2011 report are repeated in the February 5, 2013 report.
- [9] At the conclusion of Dr. McNeill's evidence on the voir dire, I qualified him as an expert in the field of pharmacology - capable of offering expert opinion evidence on the science of drugs, their actions, common uses, mechanisms, kinetics, side effects, toxicity, and interaction with other drugs and the effect of drugs including alcohol and benzodiazepines affecting the central nervous system with particular reference to their effects on the human body.
- [10] Before Dr. McNeill testified, the defence objected to three areas covered in the various reports offered by Dr. McNeill as being beyond the scope of his expertise. At the conclusion of Dr. McNeill's evidence on his qualifications, the defence withdrew its objections to Dr. McNeill's evidence and opinion on the dosage information in his reports. The defence maintains its objection as to Dr. McNeill's opinions on the remaining two areas: (1) the clinical management of a patient withdrawing from alcohol abuse; and (2) his opinions providing a medical diagnosis of automatism and amnesia, saying they are beyond the scope of his expertise.
- [11] Mr. Friebe argues that Dr. McNeill is eminently qualified to provide opinion evidence in all areas addressed in his report including his opinion on the appropriateness of the clinical management of patients withdrawing from alcohol abuse as well as automatism and amnesia.
- [12] Dr. McNeill has a PhD. in pharmacology taken at the University of Michigan Medical School. He obtained his BSc. in pharmacy studies and then practiced as a pharmacist for three years from 1960 to 1963 in Edmonton. Thereafter, he attended graduate school obtaining his Masters and then a PhD. in pharmacology. Since 1971, he has taught pharmacology in the Faculty of Pharmaceutical Sciences at UBC. Over the course of his career he taught students from various faculties including medicine, nursing, pharmacy, veterinary medicine, and dentistry.

- [13] Pharmacology is the study of the science of drugs, what they do, how they do it, dosages, how various drugs interact, the kinetic effect of how they get into and out of the body, how they are metabolised, their side effects, toxicity and the like. In teaching pharmacology, Dr. McNeill taught students about the interaction of drugs on the human body. Dr. McNeill's 87-page curriculum vitae has in the order of 800 publications listed and was marked as Exhibit 5 in the proceedings.
- [14] Although Dr. McNeill has no experience in treating patients, he teaches about the issue of alcohol withdrawal. He confirmed, however, that he has no clinical experience in managing alcohol withdrawal or applying guidelines as he is not a clinician and does not see patients. Instead, he provides information about drugs to the clinicians who do see patients.
- [15] Dr. McNeill conceded his primary area of interest for research is cardiac events and diabetes. He has not published any papers on the effects of Lorazepam or the use of alcohol with one exception of a co-authored paper on breathalyzers. He has not written any papers on benzodiazepines.
- [16] Dr. McNeill appears to have little to no experience in the complicated area of automatism; largely a legal construct that, in medical terms, relates to a dissociative state usually brought about by an underlying medical condition. He has read about automatism a bit; however, reference to the term in his reports appears to have its genesis in discussion with plaintiff's counsel in preparation for providing his expert opinion. Dr. McNeill has no training in psychiatry; his sole basis for any opinion with respect to automatism in this case appears to be his review of an article by Dr. Julio Arboleda-Florez of the Department of Psychiatry at Queen's University entitled, "On Automatism" published in *Current Opinion in Psychiatry*, 15(6): 569-576, November, 2002.
- [17] It is clear from Dr. McNeill's evidence that he has significant experience with respect to dosage information and on the general effects of drugs on a patient, including their side effects. It is equally clear, however, that he has no clinical experience in the management of alcohol withdrawal patients, or the diagnosis of patients in various medical states including amnesia or dissociative states.

Analysis

- [18] I turn first to the general principles that govern the admissibility of expert opinion evidence. In *R. v. Mohan* (1994), 89 C.C.C. (3d) 402, Mr. Justice Sopinka writing for the Court outlined at p. 411 that:

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.

[19] In *R. v. Cameron*, 2013 ONSC 1203 Madam Justice Parfett summarized the last criterion of a properly qualified expert in the following manner:

[18] ... The starting point for the analysis of whether a particular witness who is being proffered as an expert is, in fact, an expert in the area in which it is proposed s/he will give evidence is that the witness "possess special knowledge and experience going beyond that of the trier of fact" (*R. v. Beland* (1987) 36 C.C.C. (3d) 481 (S.C.C.) at p. 494). Furthermore, it has been held that deficiencies in the expertise go to weight, not admissibility (*R. v. Marquard* (1993), 85 C.C.C. (3d) 193 (S.C.C.) at p. 224). Finally, it is accepted that:

The admissibility of [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

[Internal citations omitted.]

[20] In the current application, the issue reduces to whether Dr. McNeill as a pharmacologist is a properly qualified expert capable of offering an opinion in the areas of:

- (a) the clinical management of patients undergoing alcohol withdrawal including the requisite supervision regime to be put in place;
- (b) a medical diagnosis of amnesia for any patient, including Mr. Friebe; and
- (c) an opinion on whether Mr. Friebe was in a state of automatism on the dates in question.

[21] As I noted earlier, Dr. McNeill is clearly qualified to give expert opinion evidence on the effects and side effects of the drugs in issue in this case. The defence concedes he is also properly qualified to give an expert opinion with respect to the dosage and dosage information for the drugs in issue in this case. His degrees and the fact of his decades of teaching pharmacology make that patently obvious. Accordingly, he will be permitted to provide expert opinion in the areas with respect to dosage of the medication and its general side effects.

Can Dr. McNeill offer an expert opinion on the standard of care with respect to the clinical management of a patient undergoing alcohol withdrawal in an outpatient setting?

[22] Mr. Friebe argues he can, submitting that Dr. McNeill is an expert on the literature and protocols on the effects of drugs on the body. As such, he is qualified to give an opinion as to the appropriateness of the monitoring of an outpatient detoxification. He further argues that, at the very least, Dr. McNeill is qualified to testify that the lack of monitoring of the patient, here Mr. Friebe, is not supported by the medical literature and protocols.

[23] With respect, I disagree. Dr. McNeill's evidence made it abundantly clear that he has no clinical practice; he does not treat patients, and he has no clinical experience in the management of patients undergoing alcohol withdrawal and no experience in applying the guidelines and protocols. His opinion with respect to outpatient treatment and the appropriateness of the protocols appears to be based solely on a review of the literature in an area in which he has never practiced. An opinion on the standard of care with respect to the clinical management of patients undergoing alcohol withdrawal including the supervision thereof is clearly beyond the scope of his expertise, experience, and training. Accordingly, Dr. McNeill cannot offer an opinion in that area.

[24] As was done in *Rhodes v. Biggar*, 2010 BCSC 762 the offending passages in Dr. McNeill's report that address and offer an opinion on the clinical management of patients undergoing alcohol withdrawal including the supervision thereof and any related opinion with respect to the standard of care on this issue, insofar as Mr. Friebe's treatment is concerned, are to be redacted from Dr. McNeill's report.

Can Dr. McNeill offer an expert opinion with respect to the medical diagnosis of amnesia in Mr. Friebe's case?

[25] While Dr. McNeill can provide an opinion on the effects and side effects of drugs such as Lorazepam - including that it can cause amnesia and memory loss - I find that his blending of the general side effects into the particulars of this case appears to be an opinion that improperly entrenches upon the ultimate issue in this case. Moreover, it represents an assessment of the physical or mental condition of an individual, something governed by the Medical Practitioners' Regulations, BC Reg. 416/2008 which states that only a member of the College of Physicians and Surgeons of British Columbia may practice medicine in British Columbia. Medicine is defined as follows:

"medicine" means the health profession in which a person provides the services of

- (a) assessment and management of the physical or mental condition of an individual or group of individuals at any stage of the biological life cycle, including the prenatal and post-mortem periods,
- (b) prevention and treatment of physical and mental diseases, disorders and conditions, and
- (c) promotion of good health;....

[26] Section 4(2) states:

4 (2) Only a registrant may provide a service of medicine as set out in this regulation if, on the day before this section comes into force, the provision of the same service by anyone other than a person authorized under the Medical Practitioners Act was prohibited.

- [27] Dr. McNeill is not so registered and therefore is prohibited from performing diagnoses of human ailments or the physical or mental condition of a person. Dr. McNeil's diagnosis and accompanying opinion moves into the realm of offering a specific opinion that Mr. Friebe suffered from amnesia which is a diagnosis which involves the application of various criteria and a fully informed assessment by a medical practitioner.
- [28] In *Rhodes*, supra, at para. 87 Madam Justice Russell restricted a massage therapist in the extent of her opinion that called for a medical diagnosis of the patient's condition.
- [29] Because medicine covers a vast array of specialized fields the courts have routinely confined experts in their opinions and restricted them to providing opinions within their own field of expertise. For instance, Mr. Justice Cohen determined in *Dobie v. Dlin* (2001), 95 B.C.L.R. (3d) 179 that a cardiac surgeon could not offer opinion evidence with respect to the expected standard of care provided by a cardiologist.
- [30] Although Dr. McNeill can offer an expert opinion that the side effects of Ativan may include memory loss and amnesia, he cannot go on to opine that Mr. Friebe was so afflicted in this instance.

Can Dr. McNeill provide an opinion on the underlying medical conditions which may lead to a state of automatism?

- [31] Automatism is a legal construct used to describe one specific kind of involuntary action that is the product of a mental state in which the conscious mind is dissociated from the part of the mind that controls actions. Automatism, legally speaking, comes in two forms: non-mental disorder automatism (sometimes referred to as "sane automatism") and mental disorder automatism (sometimes referred to as "insane automatism"). It most frequently arises in the criminal law context where an accused charged with a criminal offence seeks to avoid liability by arguing that his or her actions were involuntary.
- [32] In *R. v. Luedicke*, [2008] O.J. No. 4049 (C.A.), Mr. Justice Doherty writing for the Ontario Court of Appeal, fully reviewed and commented upon the current law of automatism.
- [33] In that case, the accused was acquitted at trial of sexual assault claiming he was asleep when he sexually assaulted the complainant. A sleep disorder expert diagnosed the accused as suffering from parasomnia, a disorder in which a person experiences a sudden unexplained arousal from deep sleep where the person is unaware of what he is doing and behaves in abnormal ways. The expert opined as well that parasomnia was not a mental illness or disease of the mind. The trial found that the accused satisfied the test for non-mental disorder automatism. The trial judge found the accused's actions were involuntary, that he had no control over his actions, and that they were not the product of mental disorder. The accused was acquitted.

- [34] A Crown appeal was allowed and a new trial ordered confined to the issue of whether the accused should be found not criminally responsible by reason of mental disorder under s. 16 of the Criminal Code or acquitted on the basis of non-mental disorder automatism. Justice Doherty's judgment in *Luedecke*, *supra*, provides a comprehensive and insightful review of the current complex law of sane or non-mental disorder automatism.
- [35] In *R. v. Stone*, [1999] S.C.J. No. 27 the majority of the Supreme Court of Canada took judicial notice that it will only be in rare cases that automatism is not caused by mental disorder. Indeed, many cases have noted that since *Stone*, claims of non-mental disorder automatism are limited to those rare "one off" cases in which an accused suffers a single incident of automatism and where the accused complained of some specific external event that precipitated that event so as to demonstrate that the event is unlikely to be the subject of a reoccurrence and can also show that the event could have produced a dissociative state in an otherwise "normal" person.
- [36] It should be apparent from this limited review of the jurisprudence that automatism is a very complicated area of the criminal law. It is also a medical term as Dr. Arboleda-Florez notes in his article at p. 569 used to describe a set of behaviours "outside the conscious control of the patient".
- [37] As is apparent from the article and the jurisprudence the medical construct of automatism encompasses a broad spectrum of behaviours including neurological and schizophrenic conditions, dissociative reactions, psychological blows, somnambulism and alcohol intoxication. The medical conditions that underlie a state of (medical) automatism are often serious and they usually require a diagnosis and treatment by a medical doctor, usually a specialist in psychiatry, assisted with reference to the DSM 4-TR, the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Associations.
- [38] The decision of Madam Justice Parfett in *Cameron*, *supra*, reviewed the concept of automatism in determining whether a particular forensic psychiatrist retained by the Crown on a first degree murder trial could be qualified to give expert evidence to refute the defence claim that the accused was in a state of mental disorder automatism at the time he shot his daughter-in-law. The Crown expert was a forensic psychiatrist and although he was perhaps lax in his application of proper methodology, he nevertheless was qualified to give an opinion in the area of automatism.
- [39] The plaintiff relies upon the decision of *R. v. DeVingt* (1999), 46 M.V.R. (3d) 56, [1999] O.J. No. 3610 (Ont. Ct. Jus.) and *R. v. McIntyre*, (1992), 100 Nfld. & P.E.I.R. 144 (P.E.I. S.C.) at para. 32 as support for the proposition that a pharmacologist is able to provide opinion evidence on the issue of automatism.

- [40] In DeVingt, supra, a forensic toxicologist, not a psychiatrist, was permitted to provide evidence as to the probable impact of the admitted and established overdose of diphenhydramine had on the accused charged with impaired driving. In that case the accused had taken a potential lethal overdose of sleeping pills in an effort to commit suicide. In permitting the toxicologist to give expert opinion evidence, Reinhardt J. stated at paras. 28 and 30 (QL):
28. In the case at bar, the defence argues that it was a "pharmaceutical blow" caused by a potential toxic overdose of diphehydramine that was the cause of the automatism. In this context, bearing in mind the dicta from Bastarache, J. in Stone, I think it is consistent with the reasoning of the Supreme Court to consider the evidence of a pharmacologist as the appropriate evidence. The relative certainty expressed by the experts in Parks although conclusive in the eyes of the jury in that case, is still a series of opinions, based upon the evidence. It must be subject to the scrutiny and approval by the trier of fact. (See Mewett and Sankoff, Witnesses, Chapter 10, "Admissibility of Expert Evidence", Carswell, 1999.)
- ...
30. Dr. Cooper is a forensic toxicologist, with many years of clinical work and research at the Universities of Toronto and Montreal to his credit, including work with psychotomimetics and antihistamines. After careful consideration of the procedural and evidentiary guidelines set out in Stone for a proper consideration of the sane automatism defence, I have concluded that Dr. Cooper has the appropriate credentials to provide the court with evidence as to the probable impact of the overdose on Mr. DeVingt. Although he is not a psychiatrist, he was able to acquaint me with the likely physical and mental effects on the individual that result from the blood levels of diphenhydramine found conclusively to have been present in Mr. DeVingt that night. His extrapolations back to the time of driving are the type of interpretations that he is trained to make. He has been qualified on many previous occasions to give this type of evidence involving alcohol and drugs.
- [41] However, on summary conviction appeal by the Crown, Mr. Justice Dambrot overturned the acquittal finding that self-induced intoxication, even bordering on automatism, was not an available defence for impaired driving: R. v. DeVingt (2001), 13 M.V.R. (4th) 131, [2001] O.J. No. 521 (Sup. Ct. Jus.) at para. 47.
- [42] In McIntyre, supra, the trial judge permitted a pharmacologist to provide opinion evidence on the effect of alcohol and drugs consumed by the accused on his intent, ability, and behaviour in relation to a charge of assault causing bodily harm. Dr. Rockerbie provided opinion evidence about the effects of the dosage of two Ativan pills on an obese accused and opined that it represented an overdose. He also provided an opinion on the issue of automatism. Two forensic psychiatrists also proffered an opinion on the accused being in a state of automatism at the time. All the experts were agreed that the accused could reach a state of automatism through the combined ingestion of alcohol and drugs.

- [43] It is apparent from these two decisions that, in some contexts, a pharmacologist or a toxicologist may be able to provide some opinion evidence with respect to the effects of alcohol and drugs on an individual and whether that renders the accused into an involuntary state of automatism. However, Stone, Luedecke, and Cameron, *supra*, appear to require that the expert have a certain magnitude of experience in the area in terms of diagnosis and treatment for such a condition.
- [44] Having heard Dr. McNeill's evidence on his qualifications on the voir dire, it is clear that he is not entirely familiar with either the medical or legal attributes relating to the construct of automatism and does not possess the requisite special knowledge and experience in the realm of assessing and diagnosing automatism.
- [45] Accordingly, I find that the opinions with respect to automatism, the medical diagnosis of the underlying condition and whether Mr. Friebel was in a state of automatism are beyond the scope of Dr. McNeill's expertise and therefore he is not capable of offering an expert opinion with respect to the diagnosis of automatism in this case.
- [46] Accordingly, Dr. McNeill's reports tendered by the plaintiff are to be redacted to remove the sections dealing with the clinical management, monitoring, and supervision of patients in the outpatient setting, and the sections dealing with the diagnosis of amnesia and automatism.

"Ker J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/13/09/2013BCSC0951.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/friebel-v-omelchenko-2013-bcsc-951>

Prepared on 29 October 2026 · Esheria