

CANADA / JUDGMENT

Hauk v. Shatzko

2019 BCSC 2361

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 2361 Hauk v. Shatzko

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hauk v. Shatzko,

2019 BCSC 2361

Date: 20191126

Docket: M54872

Registry: Kamloops

Between:

Susan Cindy Lou Hauk also known as Cindy Hauk

Plaintiff

And

Kevin Shatzko

Defendant

Before: The Honourable Mr. Justice Marchand

Oral Ruling re Admissibility of Janita le Roux's Report

Counsel for the Plaintiff:

R. Garner

A. Glaicar

Counsel for the Defendant:

G. Thomson

K. Schymon-Martin

Place and Date of Trial/Hearing:

Kamloops, B.C.

November 26, 2019

Place and Date of Judgment:

Kamloops, B.C.

November 26, 2019

Introduction

- [1] Cindy Hauk was injured in a motor vehicle accident on September 20, 2015. She alleges that she suffered a variety of injuries, including chronic myofascial pain, as a result of the accident. She is currently off work and alleges that the injuries she suffered in the motor vehicle accident are a necessary cause.
- [2] Ms. Hauk seeks substantial damages for her pain and suffering, past income loss, loss of future earning capacity, loss of homemaking capacity, cost of future care, and special expenses. In support of her claims, Ms. Hauk relies on a number of expert reports, including a functional capacity evaluation and cost of future care assessment prepared by an occupational therapist named Meghan Sears, dated August 23, 2019.
- [3] The defendant, Kevin Shatzko, is Ms. Hauk's partner. He is the at-fault driver in the motor vehicle accident that resulted in Ms. Hauk's injuries. Mr. Shatzko retained an occupational therapist named Janita le Roux to critique Ms. Sears' report. Ms. Hauk objects to the admissibility of the critique report prepared by Ms. le Roux dated September 30, 2019.
- [4] Specifically, Ms. Hauk submits that Ms. le Roux's report is neither relevant nor necessary. Ms. Hauk submits that it focusses on embarrassing Ms. Sears and unfairly criticizing her methodologies and conclusions, rather than providing a responding report that would assist the trier of fact. Ms. Hauk submits that Ms. le Roux's report demonstrates that she lacks objectivity, and is really an advocate for the defence.
- [5] Mr. Shatzko acknowledges that Ms. le Roux strayed from her role in two locations in her report and has proposed redactions. Mr. Shatzko submits that Ms. le Roux's report is essential to the defence and will assist me as the trier of fact in understanding shortcomings in Ms. Sears' report, and in reaching appropriate conclusions on Ms. Hauk's functional capacity, as well as the cost of any required future care.

- [6] Mr. Shatzko submits that Ms. Hauk's objection is premature, that Ms. le Roux ought to be given a chance to testify to defend herself, and that decisions on admissibility, redactions and/or weight can then be made. Mr. Shatzko submits that Ms. le Roux is not merely a hired gun.

Legal Principles

- [7] As a general rule, all relevant evidence is admissible. This general rule is subject to many qualifications. One of them relates to opinion evidence which is subject to a complicated exclusionary rule: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.
- [8] Ordinarily, witnesses testify as to facts and are not allowed to give opinions about those facts. That is because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inferences from the evidence and to form her or his own opinions on the issues in the case: *R. v. K. (A.)* (1999), 137 C.C.C. (3d) 225 (Ont. C.A.) at paras. 71-72, per Charron J.A. (as she then was).
- [9] There are many well-known reasons for the general exclusion of opinion evidence. These include concerns about usurping the role of the trier of fact, necessity, reliability, bias, confusion, delay and cost. The proper approach to determining the admissibility of expert opinion evidence was recently clarified by the Supreme Court of Canada in *White Burgess*.
- [10] The onus is on the party seeking to adduce the opinion evidence that it satisfies the criteria set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. These criteria are properly characterized as threshold requirements. If the threshold requirements are met, the court then has a gatekeeper function to ensure that the benefits of admitting the evidence outweigh potential risks. In *R. v. Bingley*, 2017 SCC 12 at para. 16, the Court held that the gatekeeper stage is best thought of as an application of the general exclusionary rule which requires the exclusion of evidence whose probative value is outweighed by its prejudicial effect.
- [11] Leaving aside opinions based on novel or contested science, and cases which seek to use accepted science for a novel purpose, the threshold requirements are:
- (1) the evidence must be logically relevant;
 - (2) the evidence must be necessary to assist the trier of fact;
 - (3) the evidence must not be subject to any other exclusionary rule; and
 - (4) the expert must be properly qualified.
- [12] Although the first criterion is framed as "logical relevance" in *White Burgess*, that must, of course, be measured in relation to a material issue. The question is whether, as a matter of logic and human experience, the expert opinion evidence will tend to prove or disprove the fact in issue. (See, for example: *R. v. Arp*, [1998] 3 S.C.R. 339, at 360).
- [13] Necessity will be established when expert opinion evidence:

- (1) provides information that is likely to be outside the experience or knowledge of the trier of fact;
 - (2) will assist the trier of fact to appreciate technical dimensions of the matter in issue; or
 - (3) relates to something about which ordinary people are unlikely to form a correct opinion without expert assistance.
- [14] Because knowledge and norms change so quickly, and may even differ from one community to the next, necessity must be determined on a case-by-case basis. (See, for example, *R. v. F. (D.S.)* (1999), 43 O.R. (3d) 609 (Ont. C.A.)).
- [15] Argument in the guise of opinion runs afoul of the necessity criterion: *Sengbusch v. Priest*, [1987] B.C.J. No. 973 (S.C.).
- [16] Regarding other exclusionary rules, one that comes to the fore in the circumstances of this case is the rule against allowing experts to opine on issues of credibility. Triers of fact do not need expert assistance in assessing the credibility of witnesses.
- [17] Properly qualified experts must have special or peculiar knowledge acquired through study or experience: *Mohan* at 25. They must also be impartial, independent and unbiased: *White Burgess* at para. 10.
- [18] Of course experts are usually retained, instructed and paid by one of the parties. This fact alone does not indicate a lack of impartiality, independence and bias: *White Burgess* at para. 32. In fact, exclusion for lack of impartiality, independence and bias will be relatively rare. As stated at para. 49 in *White Burgess*:
- ... exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
- [19] At the threshold stage, concerns about passages in an expert report that do not meet one or more of the *Mohan* criteria are often dealt with by way of redaction. *Cole v. Lau*, 2017 BCSC 2613, is an example of redaction to keep inadmissible aspects of an expert report from a jury.
- [20] If expert opinion evidence satisfies the *Mohan* criteria for threshold admissibility, the trial judge's job is not over. The court must then conduct a cost benefit analysis to determine whether the expert opinion evidence must nevertheless be excluded. After that point, if the expert evidence is admitted, there is an ongoing duty on the trial judge to ensure that any testimony given by the expert remains within the proper boundaries of expert evidence: *R. v. Sekhon*, 2014 SCC 15 at para. 46.

Analysis

- [21] Ms. le Roux is a highly trained and very experienced occupational therapist. She has prepared a 29-page report that critiques the 33-page report prepared for Ms. Hauk by Ms. Sears.
- [22] At a high level, Ms. le Roux's report is not inadmissible simply because it is critical of Ms. Sears' report. While it remains to be seen whether any or all of the critiques are founded or unfounded, many logically relate to material issues, provide information that is outside my knowledge as the trier of fact, may assist me in appreciating the technical nature of the case, and may assist me in assigning appropriate weight to Ms. Sears' report.
- [23] That said, there are aspects of Ms. le Roux's report that are, with the greatest respect, seriously flawed. In particular, there are a number of passages which are unnecessary in that they comment on Ms. Hauk's credibility, or advance argument in the guise of opinion. There is one passage that contains what was referred to in *Parish v. Scott*, [1996] B.C.J. No. 2839 at para. 13, as a "smart remark" indicative of bias. There are also several passages which appear to stray outside of Ms. le Roux's field of expertise.
- [24] I have considered all of the flaws in Ms. le Roux's report in the context of her report as a whole. I have concluded that her report is not so flawed that it should be ruled wholly inadmissible. Rather, I have concluded that the appropriate remedy is to redact the objectionable passages in her report.
- [25] In reaching this conclusion, I have relied on the fact that there are passages within Ms. le Roux's report which acknowledge the appropriateness of some testing completed by Ms. Sears and the reasonableness of some claims advanced by Ms. Hauk. Ms. le Roux's report, therefore, does not demonstrate a clear unwillingness or inability to provide fair, objective and non-partisan evidence.
- [26] I turn now to the passages in Ms. le Roux's report that must be redacted.
- [27] On page 8, at lines 260-269, Ms. le Roux questions Ms. Sears' level of expertise in dealing with patients with mental health issues. I consider this passage to be argumentative and unnecessary. I do not need Ms. le Roux's assistance in assessing Ms. Sears' qualifications. This passage will be redacted.
- [28] On page 9, at the end of line 302 to line 305, Ms. le Roux suggests that Ms. Sears has not effectively considered data related to Ms. Hauk's psychiatric conditions, likely because Ms. Sears is not familiar with the diagnoses and/or how they may influence functional testing. I consider this sentence to be argumentative, speculative and unnecessary. Again, I do not need Ms. le Roux's assistance in assessing Ms. Sears' qualifications. Further, any concerns regarding Ms. Sears' familiarity with mental health diagnoses and how they influence functional testing will become apparent through cross-examination on her qualifications and/or report, not Ms. le Roux's guesswork. This sentence will be redacted.

- [29] On page 12, at the end of line 416 to the end of line 418, Ms. le Roux concludes that Ms. Sears did not effectively assess Ms. Hauk's range of motion in her back, which is fine, but adds that all statements of limitation or recommendations concerning Ms. Hauk's back pain must be approached with caution, which is not. This sentence is argumentative and unnecessary. I do not need Ms. le Roux's assistance in assessing the credibility of Ms. Hauk's complaints of back pain. Further, equipped with Ms. le Roux's substantive comments on the testing done by Ms. Sears, counsel for Mr. Shatzko is perfectly capable of making submissions on the limits of Ms. Sears' assessment of, and recommendations concerning, Ms. Hauk's reported back pain. This sentence will be redacted.
- [30] On page 14, at the end of line 509 to the end of line 510, Ms. le Roux expresses some disbelief regarding the hours Ms. Hauk reported that she works to Ms. Sears. Ms. le Roux writes, "If the client is truly required to work 11-16 hours per day, it is recommended she address this issue by filing a Human Rights complaint." As acknowledged by Mr. Shatzko, this "smart remark" has no place in an expert report, and must be redacted.
- [31] On page 15, at lines 545-547, Ms. le Roux comments as follows:
- Based on the limited testing on behalf of the assessor, and documented questionable reliability of self-reports (albeit limited), this author does not agree that "the results of the assessment can be viewed as a reliable measure of her true abilities."
- [32] As acknowledged by Mr. Shatzko, Ms. le Roux's comment on Ms. Hauk's credibility is argumentative and unnecessary. This passage must be redacted.
- [33] On page 17, at lines 592 and 593, Ms. le Roux expresses her view that the validity and reliability of certain of Ms. Sears' conclusions and opinions are questionable. I consider this sentence to be argumentative and unnecessary. I am perfectly capable of reaching my own conclusions on Ms. Sears' conclusions and opinions, after considering all of the evidence, including those parts of Ms. le Roux's report which are not redacted, and Ms. le Roux's testimony. This passage will be redacted.
- [34] On page 18, Ms. le Roux deals with medications. In my respectful view, this entire section of her report is inadmissible. First of all, as Ms. le Roux herself notes, it is outside the scope of her expertise to comment on medications. Second, Ms. le Roux then comments on "commonly known" research regarding prolonged use of various pain medications. Commenting on this research is either outside her expertise or, if it is truly commonly known, then it is unnecessary. Third, Ms. le Roux strayed even further from her area of expertise and purported role in critiquing Ms. Sears' report by criticizing a physiatrist, Dr. Apel, who recommended Botox injections to assist in Ms. Hauk's recovery. To my knowledge, occupational therapists may not prescribe or administer Botox as recommended by Dr. Apel, and Ms. le Roux is clearly not qualified to criticize a physiatrist. Finally, what remains of this section of Ms. le Roux's report are a statement from a psychiatrist's report, a statement regarding the need for Ms. Hauk's family physician to determine her need for medications, and a statement that pain injections performed on Ms. Hauk in 2018 were not

helpful. None of these statements relate in any way to Ms. le Roux's area of expertise, or advance my understanding of Ms. Hauk's case. They are all unnecessary.

- [35] Whereas Ms. Sears appropriately confined herself to costing medications Ms. Hauk has used or that have been recommended, Ms. le Roux has strayed outside her area of expertise or stated information which adds nothing. The medication section of Ms. le Roux's report must be redacted.
- [36] The passages I have redacted are those that are clearly unnecessary and/or outside Ms. le Roux's area of expertise. They cannot be salvaged through testimony. There may be other passages in Ms. le Roux's report that I ultimately determine to be inadmissible or deserving of little weight. I will deal with any further objections as to admissibility during or after Ms. le Roux's testimony. I will deal with issues of weight once all of the evidence is in.
- [37] I thank counsel for their helpful submissions.
- [38] Madam Clerk, please pass me exhibit 1. I am going to put cross-hatching through the passages that I have redacted. In the event of an appeal, the Court of Appeal will then know precisely what is and is not in the evidentiary record based on my ruling. Once I have done the cross-hatching, I will pass exhibit 1 to counsel so they can make sure that they have correctly identified the passages that I have redacted.

"L.S. Marchand J."

MARCHAND J.

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