CANADA / JUDGMENT

Javorovic v. Booth

2021 BCSC 232

COURT
Supreme Court of British Columbia

DECIDED
6 January 2021

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2021 BCSC 232 Javorovic v. Booth

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Javorovic v. Booth,

2021 BCSC 232

Date: 20210106

Docket: M193504

Registry: New Westminster

Between:

Enida Amalija Burnard

also known as Enida Amalija Javorovic

Plaintiff

And

Teresa Lee Booth

Defendant

Before: The Honourable Mr. Justice Gomery

Oral Ruling

(Re Admissibility of Portions of Expert Report)

In Chambers

Counsel for the Plaintiff:

S.L. Kovacs

J. Malhi

Counsel for the Defendant:

K. Armstrong, Q.C.

Place and Date of Hearing:

New Westminster, B.C.

January 5, 2021

Place and Date of Judgment:

New Westminster, B.C.

January 6, 2021

[1] Counsel seek a ruling concerning the admissibility of parts of the expert report of Raph Kowalik. The report is to be tendered by the defendant in response to the plaintiff's expert report of Dominic Shew. Mr. Shew is an occupational therapist whose reports provide a functional capacity evaluation and recommendations for the cost of future case. Mr. Kowalik is similarly qualified.

[2] Ms. Kovacs helpfully confines her objections to specified portions of Mr. Kowalik's report and has identified those portions in a blacklined version of the report. By way of overview, she rests her objections on three grounds:

1. She submits that in a responsive report, Mr. Kowalik should confine himself to criticizing Mr. Shew's opinions based on the assumed facts contained in Mr. Shew's report and should not be referring to additional factual assumptions contained in an expert report of Dr. Masri tendered by the defendant that was not available to Mr. Shew when he prepared his report.

2. She submits that Mr. Kowalik's report sometimes crosses the line from expert opinion to advocacy and comingles assumed facts with opinions.

3. She submits that passages in Mr. Kowalik's report fail to satisfy the fundamental prerequisite to the admission of expert opinion evidence that it be necessary to assist the court in drawing inferences.

[3] Mr. Armstrong, Q.C., submits that the authorities make it clear that a responsive expert report need not simply rebut the first expert's reasoning. Its proper purview is to address issues raised by the first expert, citing Luedecke v. Hillman, 2010 BCSC 1538, at paragraphs 52 and 53. He submits that Mr. Kowalik's report does not cross the line from opinion into advocacy and that the passages objected to provide an explanation of Mr. Kowalik's reasoning in offering opinions in respect of issues raised by Mr. Shew.

[4] I do not agree with Ms. Kovacs that it is improper to base a responding expert report on new or different factual assumptions than those contained in the prior expert report. The point of expert evidence is to assist the court in drawing inferences based on expected primary findings of fact. These primary findings may be based on evidence tendered by either side. If Dr. Masri's expert report reveals an assumed fact that places the inferences drawn in Mr. Shew's report in a different light, there is nothing wrong with pointing that out in a responsive report.

[5] Ms. Kovacs acknowledges that Dr. Masri's report was properly served and she is not objecting to it. In that light, I do not think it is objectionable per se that Mr. Kowalik has relied upon it. In addressing Ms. Kovacs' specific objections, I bear in mind the following:

(a) As required by Rule 11-2(2), Mr. Kowalik has certified that he is aware of his duty to assist the court and not be an advocate for any party and that he has prepared his report in conformity with his duty.

(b) It is not advocacy for an expert to identify the facts upon which she relies and to state her reasoning clearly and logically even though the effect may be persuasive.

(c) The proper concern of expert evidence is the drawing of inferences, not making findings of primary fact. It falls outside the proper scope of expert opinion for the expert to offer reasons why the trier of fact should make certain findings of primary fact.

(d) Redacting an expert report to remove objectionable passages is often appropriate, Maras v. Seemore Entertainment Limited, 2014 BCSC 1109. However, it is not appropriate to redact passages where the redaction would obscure or distort the expert's reasoning.

The Objections

Page 3, line 69

[6] Mr. Kowalik disagrees with Mr. Shew's opinion that Ms. Javorovic's work as a postal service manager requires heavy lifting with reference to a certain referenced standard. Mr. Kowalik gives three reasons for disagreeing. Ms. Kovacs objects to the third reason.

[7] The third reason is that Ms. Javorovic may obtain the assistance of coworkers. While this is clearly an assumption, it is not identified as such and Ms. Kovacs is right to say that it should have been. This is the kind of deficiency that can be addressed, if necessary, through cross-examination and I would not strike the passage on this ground alone.

[8] It is not improper for Mr. Kowalik to state the basis for his opinion. Ms. Kovacs is quite not objecting to the opinion itself. I think it would distort that opinion to redact a part of the underlying reasoning. It will be open to Ms. Kovacs to challenge the opinion through cross-examination or in argument on various grounds.

Page 3, lines 83 to 84

[9] Mr. Kowalik criticizes conclusions drawn by Mr. Shew in a table comparing Ms. Javorovic's job requirements with her demonstrated abilities. He suggests that, properly conducted, the comparison indicates that Ms. Javorovic is able to meet the demands of her job. Ms. Kovacs objects to the concluding sentence of the paragraph which states, "This is consistent with Ms. Javorovic being capable of working at her job for years following her subject MVA."

[10] I agree with Ms. Kovacs that the concluding sentence steps over the line from opinion into advocacy. It is an attempt to persuade me to make a finding of primary fact. This sentence should be struck.

Page 4, lines 89 to 115

[11] Mr. Kowalik identifies the question of causation as one bearing on Mr. Shew's recommendations concerning the cost of future care. He quotes from Dr. Masri's report and suggests that, based on Dr. Masri's opinion, Mr. Shew's recommendations overstate the cost of future care attributable to the accident that is the subject of this action.

[12] In my opinion, this is appropriate opinion in a responsive report. At the end of the day, it will be only helpful if and to the extent that I accept Dr. Masri's opinion and the defendant's argument based on that opinion, but that is no reason not to admit it in evidence.

Page 4, line 123 to Page 5, line 125

[13] Ms. Kovacs refers to a sentence containing a parenthetical observation concerning a conclusion drawn in a plaintiff's expert report that will not be tendered in evidence. This sentence is unhelpful and should be struck.

Page 5, lines 126 to 129

[14] In the paragraph beginning at line 120, Mr. Kowalik gives reasons for disagreeing with Mr. Shew's recommendation that Ms. Javorovic receive vocational counselling and possible retraining. Ms. Kovacs objects to two sentences drawing an inference based on Dr. Masri's report that Ms. Javorovic does not need to consider retraining at this time. In my opinion, this is an appropriate opinion in a responsive report.

Page 5, lines 135 to 138

[15] Mr. Shew anticipates that Ms. Javorovic will incur costs of future care in connection with anticipated future surgeries. Mr. Kowalik states that based on Dr. Masri's opinion, such costs may be incurred. It not inappropriate for Mr. Kowalik to refer to Dr. Masri's opinion and identify its implications for Mr. Shew's recommendations. Mr. Kowalik begins the sentence in question with the words, "I caution the reader .". I do not think that this verbal formula is any more objectionable than "I note that " or "The reader may wish to consider ." In substance, Mr. Kowalik has not descended into inappropriate advocacy.

Disposition

[16] To summarize, two sentences should be struck from Mr. Kowalik's report: the final sentence of paragraph 2 at line 82 to 84 and the sentence at lines 123 to 125. Otherwise, I dismiss the objection.

"Gomery J."

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