

CANADA / JUDGMENT

Lundgren v. Taylor

2023 BCSC 816

COURT

Supreme Court of British Columbia

DECIDED

21 February 2023

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2023 BCSC 816 Lundgren v. Taylor IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Lundgren v. Taylor, 2023 BCSC 816 Date: 20230221 Docket: M189002 Registry: Vancouver Between: Natasha Jayne Lundgren Plaintiff And Douglas Taylor Defendant

- and - Docket: M193465 Registry: Vancouver Between: Natasha Jayne Lundgren Plaintiff And Lynda Diane Eyra Defendant Before: The Honourable Justice Chan Oral Reasons for Judgment Voir Dire #1 Re: Admissibility of Expert Report Counsel for the Plaintiff: S.T.Cope Counsel for the Defendant: M.F. O'Meara Place and Date of Trial/Hearing: Vancouver, B.C. February 17, 2023 Place and Date of Judgment: Vancouver, B.C. February 21, 2023

Introduction

- [1] This trial involves two motor vehicle accidents which occurred in 2016 and 2018. The plaintiff alleges she sustained injuries in these accidents. The parties have tendered various expert reports. The plaintiff objects to the admissibility of an expert report dated November 14, 2022 from Dr. Jonathan Hawkeswood, tendered by the defence.
- [2] The plaintiff argues Dr. Hawkeswood's report, marked as Exhibit 1 on the voir dire, is not admissible as expert evidence.

Background

- [3] Dr. Hawkeswood is a physician specializing in physical medicine and rehabilitation who conducted an independent medical examination of the plaintiff on October 26, 2022. His report is set out with the following sections: · Introduction; · Duty to Court; · Qualifications; · Instructions and Nature of Opinions Being Sought; · Facts and Assumptions Relied Upon for the Purpose of this Medical Legal Opinion, and · Opinion.
- [4] Within the section on opinion, it is further divided as such: · Diagnosis, differential diagnosis; · Causation; · Treatment plan; · Overall prognosis and expectations; · Residual functional abilities or restrictions; and · Vocational abilities and limitations.

- [5] The last portion of the report is entitled Supportive Information, and consists of the following: · Medical history and pre-accident symptoms; · Accident details; · History of presenting illness/current symptoms; · Medications; · Allergies; · Function; · Recreation; · Social review; and · Physical examination.
- [6] The report contains the following appendices: · Appendix I - list of documents; · Appendix II - information and records review; · Appendix III - letter of instruction; and · Appendix IV - c.v.
- [7] All of the plaintiff's objections except one are found in the diagnosis and causation sections of the opinion.

Legal Framework

- [8] The framework for the admissibility of expert opinion evidence was set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 [Mohan] and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess]. These decisions set out a two-stage test for admissibility.
- [9] First, the party proffering the expert evidence must meet the threshold criteria for admissibility. These are relevance, necessity, absence of an exclusionary rule, and a properly-qualified expert. These are commonly referred to as the Mohan criteria. If the expert evidence does not meet these criteria, it should not be admitted: *Whaley v. Bryant*, 2020 BCSC 531 at para. 10 [Whaley].
- [10] If the threshold requirements are met, the court retains the discretion to exclude evidence if the risks in admitting the evidence outweighs its benefits. This second stage of the admissibility test is referred to as the gatekeeper stage: *White Burgess* at para. 24; *Whaley* at paras. 22 to 23.
- [11] Concerns of impartiality or bias can be considered in both the threshold criterion of a properly qualified expert as well as in the gatekeeping stage: *Whaley* at para. 24. Plaintiff's Position
- [12] The plaintiff argues the Hawkeswood report is not admissible for the following reasons: · Dr. Hawkeswood attacks the plaintiff's credibility through his use of various phrases in his report, and findings of credibility are for the trial judge; · Dr. Hawkeswood is not impartial, as shown through his choice of words in portions of his report which are designed to cast the plaintiff in a negative light; and · Dr. Hawkeswood goes beyond his area of expertise by commenting on the plaintiff's mental state and surgery for breast cancer.
- [13] I will now set out the specifics of the plaintiff's arguments.
 - (a) Attacks on the plaintiff's credibility and usurping the role of the trial judge

- [14] The plaintiff argues the following paragraphs in the Hawkeswood report show the doctor was attacking the plaintiff's credibility in his report. She argues credibility is to be assessed by the trial judge.
- [15] Paragraph 1: the doctor states that the pain generator for the mechanical low back pain is unclear. He further states low back pain is common with prolonged sitting. The plaintiff argues the doctor is attacking her credibility and denigrates the substance of her complaints.
- [16] Paragraphs 2: the plaintiff takes issue with the doctor's use of the phrase "a degree of pain inhibition", arguing this makes it appear the pain is contrived. The plaintiff also takes issue with the doctor using the word "fortunately" in describing a strong rotator cuff.
- [17] Paragraphs 3, 6 and 7: the plaintiff takes issue with the use by the doctor of the phrase "I do not have an explanation" when referencing the plaintiff's right arm, knee and ankle pains. She argues this is an attack on her credibility.
- [18] Paragraph 5: the doctor's use of "to be frank" and "I would be reluctant to conclude" in the context of a statement of whether the plaintiff has any functional limitation in the right hip, is an attack on the plaintiff's credibility. The plaintiff argues these words are judgmental and not neutral.
- [19] Paragraph 9: the doctor notes that the plaintiff has probably developed a generalized pain disorder, which is common with deconditioning. The plaintiff argues the doctor is attacking her credibility
- [20] Paragraph 13: the plaintiff takes issue with the doctor's comment that her level of activity has been low. She argues this is an attack on her credibility, as there is no objective evidence to support this statement
- (b) Dr. Hawkeswood is not impartial
- [21] Paragraphs 11 and 24: the doctor commented that he finds it unlikely the plaintiff suffered a concussion in the 2018 accident. The plaintiff argues the doctor's description of both accidents as "relatively minor in nature" is not relevant. Concussion was not pled by the plaintiff in relation to the 2018 accident, and the doctor was not asked for any opinion on the severity of the impact of the collisions. The plaintiff argues the doctor's inclusion of these paragraphs show he is not impartial and objective.
- [22] Paragraph 26: in this paragraph, the doctor summarizes his findings on causation. The plaintiff argues the summary is not written objectively and borders on advocacy.

- [23] Paragraph 117: this appears under the section, physical examination, under heading Supportive Information. She objects to the doctor's use of the term "pain behaviours" in describing the physical assessment, which she argues is a loaded subjective characterization. She also takes issue with the doctor describing her use of objects for support as being "dramatic", arguing this shows bias and judgment against her.
- (c) Dr. Hawkeswood goes beyond his expertise
- [24] Paragraph 12: the doctor is not an expert in psychiatry, yet he made various comments with respect to her mental state. She argues the doctor's comments are not relevant and borders on fact finding.
- [25] Paragraph 25: the doctor refers to the plaintiff's breast cancer surgery, and comments on that surgery being the cause of the plaintiff's upper chest pain. She argues the doctor is not an expert in mastectomy and he is going beyond his expertise.
- [26] The plaintiff argues the doctor's mindset is biased against the plaintiff, and that bias is manifested throughout the report as a whole. As such, redactions will not be sufficient to cure the report of the defects, and the report must be excluded in its entirety. Defence Position
- [27] The defence position is with the exception of a few areas, the report as a whole meets the threshold test for admissibility. As for the court's gatekeeping function, the defence argues the benefits of the report to the trier of fact outweighs any prejudicial effect. The report is highly probative of issues of diagnosis, causation, treatment and prognosis of the plaintiff's injuries. Dr. Hawkeswood provided his opinion on matters within his area of expertise and did not venture into areas outside his expertise, and he does not express any opinion on the plaintiff's credibility. With a few redactions, the defence position is the report is admissible.
- [28] The redactions defence counsel suggest are the following: · paragraph 2, the word "Fortunately" should be redacted so the sentence reads "The rotator cuff was strong during today's testing"; · paragraph 12, line 175, the sentence "This probably represents a very high level of learned helplessness and medicalization of her condition" should be deleted; · paragraph 117, the portion of the sentence which reads " plus perhaps a degree of her being dramatic (leaning very heavily on stationary objects for movement, and not being able to lie down flat initially)" should be edited. · Paragraph 24 the first two sentences "Given that Ms. Lundgren is now spending considerable time in a wheelchair, it seems fair to point out that both accidents appear to be relatively minor in nature. She was not braced prior to either impact, noting that bracing can sometimes render worse outcomes" should be deleted.

Analysis

Necessity and absence of an exclusionary rule

- [29] An expert medical witness ought not to make any assessment of the patient's credibility. Credibility is a proper question for the trier of fact, and it is inappropriate for an expert to provide an opinion on credibility: *Didyuk v. Redick*, 2021 BCSC 2272 at para. 22.
- [30] In my view, Dr. Hawkeswood did not make any assessment of the plaintiff's credibility in his report. In paragraphs 1 through 13, the doctor set out his diagnosis and differential diagnosis based on his expertise in physical medicine and rehabilitation. Where Dr. Hawkeswood stated he did not have an explanation for pain, he is doing no more than setting out his opinion that the source of the pain was unclear: paras. 3, 6, and 7. He does not go further to offer any opinion on whether the plaintiff was being honest in her complaints of pain.
- [31] The plaintiff takes issue with Dr. Hawkeswood at places stating that her complaints of pain were common: paras. 1, 5, and 9. However, read in context, the doctor was stating in his experience, there are other common explanations for complaints of pain in those areas of the body. I do not view that as a comment on the plaintiff's credibility.
- [32] With respect to the doctor's comment that the plaintiff's activity level has been low, in my view, that is not an attack on her credibility. She reported to the doctor what she was doing in terms of rehabilitation exercises (para. 30); that she has fatigue (para. 42); she uses a wheelchair (para. 51); what she is capable of doing inside the house (para. 52); and that she had been not working since before the 2016 accident. There is a basis for the doctor to make that statement.
- [33] This report is in contrast to the expert report in *Didyuk v. Redlick*, 2021 BCSC 2272 [*Didyuk*], which was excluded from evidence due to the doctor's attack on the plaintiff's credibility and lack of impartiality. That report was also authored by Dr. Hawkeswood. However, in that report, there was strong evidence that the doctor strayed from his proper role and offered his negative assessment of the plaintiff's credibility. In that report, the doctor directly questioned the plaintiff's honesty with reporting his symptoms; the doctor stated he questioned the reliability of the plaintiff's reporting of his symptoms, and accused the plaintiff of malingering; and went so far in the report to state that the plaintiff "presented as being more physically disabled than he probably is". In his report on Ms. Lundgren, Dr. Hawkeswood did not offer any comments on the plaintiff's credibility. A properly qualified expert - duty of impartiality
- [34] An expert witness has a duty to be fair, objective and non-partisan: *White Burgess* at para. 46. The Supreme Court of Canada in *White Burgess* goes on to explain how a party should mount a challenge to an expert's impartiality.

- [48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence
- [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court
- [35] In this case, Dr. Hawkeswood has indicated in the first page of his report that he is aware of his duty to the court, and if called to testify, he would abide by this duty. On a reading of his report as a whole, I do not find that there is a realistic concern that the doctor will be unable and/or unwilling to comply with his duty to be fair, objective and non-partisan.
- [36] The plaintiff takes issue with the doctor's statement that he finds a concussion unlikely from the 2018 accident, as the plaintiff did not plead a concussion in her notice of claim for the 2018 accident. However, the plaintiff did plead aggravation of her previous injuries, which included concussion with headache from the 2016 accident.
- [37] The plaintiff argues the doctor's summary of findings on causation at para. 26 are argumentative. In my view, the doctor is providing an opinion on matters within his expertise, including the plaintiff's areas of pain and whether they are related to the motor vehicle accidents. Read in the context of the report as a whole, the doctor's summary of findings on causation do not show he is biased and not objective.
- [38] This is in contrast to the report of the doctor that was excluded in *Didyuk*. In that case, Dr. Hawkeswood did cross the line and engaged in fact-finding exercises which showed his lack of objectivity. In that case, Dr. Hawkeswood surreptitiously watched the plaintiff while he was in the waiting room, and relied on how the plaintiff appeared in the waiting room as compared to the examination room to suggest the plaintiff was exaggerating his condition. The doctor commented on the plaintiff's sunglasses, suggesting the price tag still attached to it showed the plaintiff likely did not need them. There were other examples of language used by the doctor in that report which called into question his impartiality.
- [39] There is no evidence of Dr. Hawkeswood engaging in that conduct in this report. There is nothing in the report on Ms. Lundgren which brings forth a realistic concern that Dr. Hawkeswood will be unable and/or unwilling to comply with his duty to be fair and impartial. Evidence beyond his expertise
- [40] The plaintiff argues the doctor ventured into areas beyond his expertise, offering comments on her mental health and effects of her mastectomy.

- [41] In my view, in paragraphs 12 and 25, Dr. Hawkeswood does not go beyond his expertise to offer any opinion on mental health or treatment for breast cancer. In paragraph 12, the doctor describes in his report what the plaintiff reported to him about her level of depression and her driving anxiety. He described his observation of the plaintiff as not showing signs of active psychosis and that she appeared calm and collected. He offers no medical opinion on whether she suffers from mental health issues. The doctor does offer comment on the plaintiff's use of a wheelchair, pointing out that she has no history of neurological issues consistent with paralysis. However, as a physical medicine and rehabilitation specialist, the doctor does have expertise in the area of musculoskeletal and neurologic conditions. With respect to paragraph 25, the doctor does not do more than point out he cannot exclude the possibility of the plaintiff's right chest and arm pain as being related to her mastectomy. He offers no opinion on that matter. Gate-keeper function
- [42] At the second stage, the court must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers of the evidence: White Burgess at para. 54. I am satisfied that Dr. Hawkeswood's report can be admitted with the redactions suggested by the defence. I would add two more redactions: · Paragraph 12, third bullet point which reads "She did not attend to any perceived external stimuli, show evidence of abnormal thought content (beyond the constraints of her health issues), nor show evidence of active psychosis by way of today's assessment". The words in brackets "beyond the constraints of her health issues" should be deleted, as those words are unnecessary. · Paragraph 24 which reads "There were whiplash-type forces in both accidents, although seemingly not enough to cause significant structural injury or lasting tissue damage in the accidents". The word "seemingly" should be deleted, as it is unnecessary.
- [43] Dr. Hawkeswood's report, along with the other medical expert reports, will assist the court in understanding the plaintiff's injuries, causation, prognosis and future treatment options. This is a judge alone trial. I am satisfied that the court, with the assistance of counsel, can be properly instructed in the receipt of this evidence.

Conclusion

- [44] The expert report of Dr. Hawkeswood with the redactions indicated is admissible. "Chan J."

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