

CANADA / JUDGMENT

Mand v. Cheema

2024 BCSC 1701

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2024 BCSC 1701 Mand v. Cheema

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mand v. Cheema,

2024 BCSC 1701

Date: 20240711

Docket: S205263

Registry: Vancouver

Between:

Gurdarshan Singh Mand, Jagpal Kaur Mand, Kuldip Singh Gill,

and Sukhminder Kaur Gill

Plaintiffs

And:

Harjinder Singh Cheema, Cheema Brothers Trucking Ltd.,

and Cheema Bros. Transport Ltd.

Defendants

Before: The Honourable Justice Blake

Oral Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Dates of Hearing:

Vancouver, B.C.

July 3-4 , 10, and 11, 2024

Place and Date of Ruling:

Vancouver, B.C.

July 11, 2024

Table of Contents

I. INTRODUCTION.. 3

II. BRIEF BACKGROUND.. 4

III. THE REPORTS. 7

IV. APPLICABLE LEGAL PRINCIPLES. 9

A. Admissibility of an Expert Report 13

1. The Threshold Inquiry. 14

2. The Gatekeeping Inquiry. 14

B. Abridgment of Time to Serve an Expert Report 15

V. ANALYSIS. 16

A. The Threshold Inquiry. 16

1. Absence of an Exclusionary Rule. 17

2. Relevance and Necessity. 18

B. The Gatekeeping Inquiry. 21

C. Abridgment of Time to Serve an Expert Report 22

VI. CONCLUSION.. 23

I. INTRODUCTION

- [1] By way of introduction, this matter is now in its second continuation, and this trial is now scheduled for 95 days. On Thursday, June 20, 2024, before this matter resumed on Monday June 24, 2024, the plaintiffs served two expert reports; an expert report of Dr. Parmar, a specialist in geriatric medicine dated June 7, 2024 (the "Parmar Report"); and an expert report of Dr. Bhalla, a clinical neuropsychologist, finalized June 7, 2024, and ultimately dated June 19, 2024 (the "Bhalla Report"). Both doctors assessed the cognitive abilities of Gary Mand, a plaintiff in this proceeding. They each provided their expert opinion on the same. On June 24, 2024, the plaintiffs advised me that they intended to bring an application for leave to tender each of these expert reports at trial.
- [2] Dr. Bhalla, a neuropsychologist, conducted testing of Mr. Mand upon the request of Dr. Parmar, and provided his assessment and opinion of Mr. Mand's cognitive abilities upon which Dr. Parmar relies. Dr. Parmar also met with Mr. Mand and provided her opinion that he suffers from Mild Cognitive Impairment ("MCI"), exacerbated significantly by his alcohol use, and has an impulsive personality. While the plaintiffs now only wish to rely upon the Parmar Report, they initially sought to tender both medical opinions into evidence. On the second day of argument, they abandoned their application to have the Bhalla Report determined to be admissible, and now only seek to tender the Parmar Report.
- [3] This is a highly unusual case. The plaintiffs admit Mr. Mand had the necessary capacity to testify at trial. They agree his testimony at trial and his direct evidence was at times confused, self-contradictory, and non-responsive. They acknowledge on cross-examination his testimony became even more problematic. Everyone recognized that he was frequently not responding to the questions asked, was contradicting himself, and at times appeared to be confused. Plaintiffs' counsel says he at times became "stuck" in his recollections, even when they made no sense. Counsel are concerned my ultimate determination will be that he lacks credibility and reliability, and so I may not accept any of his evidence. To quote counsel, they are concerned that I may decide to "throw the baby out with the bathwater".
- [4] They intend to argue that he was credible and reliable, and that I should accept some of his evidence. They say the Parmar Report is properly admissible to assist me in my eventual determination of Mr. Mand's reliability and credibility, and which of his evidence I ultimately decide to accept.

II. BRIEF BACKGROUND

- [5] The trial in this matter commenced on June 12, 2023, and was at that time scheduled for 25 days. At the commencement of trial, the defendants brought an application to withdraw admissions. In reasons indexed as *Mand v. Cheema*, 2023 BCSC 1388, I granted that application. For a number of reasons, including the withdrawal of admissions, the time scheduled was inadequate.

- [6] The trial continued in January and February 2024 for approximately 18 days. It recommenced for its second continuation on June 24, 2024, and is now set for approximately an additional ten weeks over the summer. Closing argument is scheduled for two weeks in November 2024. At this time, the total estimate of time necessary for the trial to complete is now 95 days.
- [7] The litigation centers on a property located at 6728 - 152nd Street, Surrey, BC (the "Subject Property"). It is legally owned by the defendant Harjinder Cheema. The central issue at trial is what, if any, beneficial interest the plaintiffs have in the Subject Property, which they say is held by Mr. Cheema in his capacity as trustee. Relevant to this application, among the admissions that were allowed to be withdrawn, was an admission that Mr. and Mrs. Mand advanced ten percent of the net purchase price for the Subject Property. Mr. Cheema now advances a defence that they did not. Plaintiffs' counsel notes that given this, Mr. Mand's testimony is now clearly critical.
- [8] Mr. Mand testified in direct examination for approximately four days. His cross-examination unexpectedly took approximately 17 days, and eventually finished on March 6, 2024. For the entirety of his testimony he testified through an experienced court-certified translator. Mr. Mand's testimony, and in particular his cross-examination, was recognized by all to proceed in an unusual manner. On his direct examination, there were times in which his evidence appeared to be confused, self-contradictory, and on occasion non-responsive.
- [9] However, on cross-examination, his evidence became much more problematic. In their notice of application, the plaintiffs set out a variety of examples of his difficulties, summarized as follows:
- a) he was frequently not responsive to questions;
 - b) "on occasions, his evidence one moment, sometimes on innocuous matters, appeared in direct contradiction to his evidence given just moments before"; and
 - c) when asked about his historical documents, he sometimes became confused "when comparing objective facts to his testimony".

During Mr. Mand's cross-examination, counsel and I worked to find ways to ensure his cross-examination completed in a fair, reasonable, and timely manner. Initially, with the agreement of Mr. Taylor, I allowed plaintiffs' counsel to speak to Mr. Mand to remind him of his responsibility to answer the specific questions that were being asked of him.

- [10] Mr. Taylor also helpfully agreed to shorten many of his questions, repeatedly asked Mr. Mand if he understood the questions, told him to advise if he did not understand, and frequently advised him he was not being responsive to the questions and asked him to respond again. Much more frequently than is normal during cross-examination, I also advised Mr. Mand he was not being responsive, and asked him to answer the questions asked. I repeatedly warned him that if he failed to respond to the questions being asked, defence counsel may ask me to make a finding that he was intentionally not answering the

questions asked. Ultimately, an agreement was reached where Mr. Taylor would give him the opportunity to answer the question and if the answer was non-responsive, would ask me to direct the witness to answer. If the answer was still not responsive, as appropriate, he would request I again direct Mr. Mand that I may ultimately conclude he was intentionally not answering the question, and then counsel would ask the question a last time. This process unfortunately became necessary to ensure that the defendants had their fulsome cross-examination of Mr. Mand, but that it would eventually complete.

- [11] During cross-examination, defence counsel told Mr. Mand that he was "playing games" with the Court; "making a fool" of everyone; was deliberately refusing to answer questions; and clearly had made a pre-meditated decision to falsify his evidence. Plaintiffs' counsel now relies on these statements as a further basis for why they say the Parmar Report should be admitted into evidence, as they say it is clear defence counsel will be arguing Mr. Mand lacks credibility, and his evidence should be ignored in its entirety. During such a frustrating experience, defence counsel made comments that made it clear that this will be their position at the end of trial.
- [12] His cross-examination was so problematic that on February 23, 2024, during cross-examination, plaintiffs' counsel took the extraordinary step of requesting that Mr. Mand be excused from the courtroom, and advised the Court that they were concerned he may be suffering from a cognitive impairment. At that time, defence counsel advised he did not share the concerns, and that he believed Mr. Mand has "a weak relationship with the truth". I noted at the time that plaintiffs' counsel were in a difficult position, and that if, in fact, there was a cognitive impairment, it may have a range of consequences. I also noted the possibility of an assessment by a specialist, including to assess Mr. Mand's capacity to instruct counsel.
- [13] The plaintiffs began to seek a doctor to conduct a capacity assessment of Mr. Mand on March 18, 2024. Although counsel did make a reference to Mr. Mand's potential assessment at a judicial management conference, at no time before they served the two expert reports on June 20, 2024 did they advise defence counsel Mr. Mand had been assessed and that they expected a report may be forthcoming.
- [14] From March 7, 2024 until June 24, 2024, I conducted three further judicial management conferences: March 15, May 13, and June 5. As the trial has proceeded, I have repeatedly stressed to counsel the importance of collaboratively working to ensure the witness schedules were accurate, and to ensure that this matter completes within the 95 days currently scheduled. I have also repeatedly warned counsel that they will be held to the time estimates they have for the anticipated witnesses, barring unforeseen circumstances.
- [15] The plaintiffs now seek to tender the Parmar Report at trial. They seek a determination that it is an admissible expert opinion, and they also seek to abridge the time requirements for service of the report as set out in the Supreme Court Civil Rules [Rules].

[16] On the first day of this application, I questioned plaintiffs' counsel as to exactly how they say the expert opinion of the two doctors, and in particular that of Dr. Parmar, is of assistance to my ultimate determination of Mr. Mand's credibility and reliability as a witness, as it was not readily apparent from their notice of application. Ultimately, I ordered they amend their notice of application to clearly set out the relevance, which they did (the "Amended NOA"). In broad terms, they say it is relevant and necessary to my assessment of his credibility and reliability, and so they say it is ultimately relevant to a determination of the material facts in issue in this proceeding.

III. THE REPORTS

[17] Dr. Parmar met with Mr. Mand on May 24, 2024, and conducted an assessment. At her request, the neuropsychologist, Dr. Bhalla, conducted extensive testing of Mr. Mand on May 30, 2024, and produced a neuropsychological assessment report. Dr. Parmar also produced a report dated June 7, 2024. Counsel advised it took some time to finalize both reports, but that the dates were never updated.

[18] Dr. Parmar noted the purpose of her opinion was to provide an opinion of Mr. Mand's cognition, and to assess his ability to provide responsive answers to questions asked of him in court. She was also asked to provide her opinion of his competency to instruct legal counsel in this proceeding.

[19] Among the documents she relied upon was the Bhalla Report, in which Dr. Bhalla opined:

Taken together, [Mr.] Mand does not appear to be functioning in the Major Neurocognitive Disorder range, based on his performance during the current assessment and due to there being no indication of functional decline. Mr. Mand's profile on measures of executive functioning (including the behavioural observations noted above) during the current assessment is suggestive of some cognitive decline, up and above what would be expected from language-based difficulties alone, although some of this might also represent long-standing personality to make decision/answer questions quickly (i.e., impulsivity), as well as frustration with having to complete the current assessment and his desire to complete it quickly.

Dr. Bhalla opined that Mr. Mand is "best characterized as provisionally meeting criteria for Mild Alcohol Use Disorder with Alcohol-induced Mild Neurocognitive Disorder", and he deferred to Dr. Parmar to more carefully assess and opine on Mr. Mand's alcohol use.

[20] Dr. Parmar concluded that while Mr. Mand does not have dementia (or Major Neurocognitive Disorder), he does fulfill the criteria for MCI. She described MCI as "a pre-dementia state where processing speed slows and often patients can complete tasks but require more time, opportunity for repetition and shorter sequences for multi-step commands" She noted in her report specifically that in her interview with Mr. Mand "his initial answer would often be wrong, but with repetition of the question in shorter stages and with trying to minimize abstraction he did well". She opined that "[h]e will require more time, repetition of questions and shorter questions to answer accurately". She noted that he

demonstrated a consistent personality trait of impulsivity, and she commented that this is a "long-standing trait and not a medical diagnosis but is still compounding with his MCI and alcohol intake". She summarized her opinion as follows:

Mr. Mand has Mild Cognitive Impairment of Probable Vascular Subtype and concerns with high alcohol intake. He is competent to provide direction to his legal counsel and to provide testimony in court but given his mild cognitive deficits, personality traits and language skills he does require short, directed questions for him to be able to process the question and provide accurate answers.

Mr. Mand was strongly encouraged to cut back or ideally cease his alcohol intake for his general health. I also reviewed with him that given his MCI he is vulnerable to the cognitive effects of alcohol and any alcohol intake will impair his ability to provide accurate testimony. He should not testify if he has had alcohol recently.

[21] Dr. Parmar concluded that Mr. Mand is able to instruct counsel, to provide directions to his lawyer, and to testify. She also made a number of recommendations as to accommodations that he should be given during his time testifying, namely:

- a) a translator be used;
- b) short, direct questions with clear instructions to listen to the translator only should be used, and he should repeat the question to the translator to ensure he has understood the question; and
- c) he should not drink alcohol before testifying.

[22] Dr. Parmar did not review the transcripts of Mr. Mand's testimony to identify any portions that she says were clearly the result of his MCI, nor did she opine on how to assess his testimony if her recommended accommodations failed to elicit clear and comprehensive testimony.

IV. APPLICABLE LEGAL PRINCIPLES

[23] As already noted, when pushed in oral submissions, counsel advised he will ultimately be advancing an argument that Mr. Mand was a reliable and credible witness insofar as the material facts in issue. He says the expert opinion of Dr. Parmar is necessary to assist me in determining the medical basis for the manner in which he testified and his confusion. In the Amended NOA, counsel expanded upon this argument, stressing that the fact-finding function of a trial judge is to consider all relevant evidence to ultimately determine facts. They say that the Parmar Report is relevant because Dr. Parmar's opinion may assist in determining whether some portions of his evidence were the result of his MCI, or whether he was deliberately attempting to mislead the Court.

- [24] Before setting out the applicable legal principles, it is first necessary to put this application into the appropriate legal context. There is no question that Mr. Mand had the capacity to testify at trial. The right to cross-examine a witness is a principle of fundamental justice, and is critical to determinations of credibility and reliability: *R v. Kliman*, 47 C.R. (4th) 137 at paras. 62-68, 1996 CanLII 8364 (B.C.C.A.) [Kliman].
- [25] Credibility and reliability are separate concepts. Credibility relates to honesty and the willingness to speak truthfully, whereas reliability relates to a party's ability to accurately observe, recall and recount the events in issue.
- [26] The ultimate conclusion as to the credibility or reliability of a particular witness is for the trier of fact, and is not the proper subject of expert opinion: see *R. v. Marquard* [1993] 4 S.C.R. 223 at para. 49, 1993 CanLII 37 [Marquard].
- [27] Credibility is within the competence of a lay person to determine, and the principle is to reject expert evidence that opines on the truthfulness of a witness. The policy behind rejecting expert evidence on the truthfulness of a witness was set out by the Supreme Court of Canada in detail in *Marquard*:
- [49] Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty-bound to render a true verdict. Finally, credibility is a notoriously difficult problem, and the expert's opinion may be all too readily accepted by a frustrated jury as a convenient basis upon which to resolve their difficulties.
- [28] However, expert evidence which opines on human conduct, and the psychological and physical facts which may lead to certain behaviour relevant to credibility, is admissible, if the proposed expert evidence "goes beyond the ordinary experience of the trier of fact": *Marquard* at para. 51. Expert evidence "is admissible to show that a witness suffers from a mental disability which affects his or her ability to testify reliably" and may extend beyond the fact of a diagnosis but also to "the extent to which the credibility of the witness is affected": *Kliman* at para. 63. It may be admitted to demonstrate that a witness suffers from "an abnormality or defect capable of affecting the reliability of that person's evidence": *R. v. R.P.*, 2020 BCSC 129, at para. 60 [R.P.].
- [29] With that in mind, it is helpful to review briefly the generally accepted process through which a trial judge assesses credibility. In the often-quoted case of *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dillon set out a helpful methodology for determining credibility at para. 187:
- a) first, consider the testimony of a witness on a stand-alone basis, followed by an analysis of whether the witness' story is inherently believable;

- b) second, if their testimony has survived relatively intact, then evaluate their testimony based upon the consistency with other witnesses and documentary evidence (the testimony of non-party, interested witnesses may provide a reliable yardstick for comparison); and
 - c) finally, determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances.
- [30] In the first stage of assessing the stand-alone credibility and reliability of a witness, the trial judge should consider a number of relevant factors. Justice Kent in *Eaglestone v. Intact Insurance*, 2022 BCSC 2007 at para. 17 summarized some of the factors as including:
- a) consistency of the witness' account of events;
 - b) consistency with other admissible evidence from witnesses, documents, or other physical objects;
 - c) whether the evidence is reliably corroborated or contradicted by other evidence;
 - d) the witness' ability to reliably recall and communicate details;
 - e) the demeanour of the witness and whether the questions are answered in a frank and forthright fashion without evasion, speculation, or exaggeration; and
 - f) the inherent plausibility of the evidence and its consistency with the probabilities as they affect the case as a whole.
- [31] Further, when determining whether a witness' evidence is "reasonable" or "inherently believable", or "plausible", a trier of fact must be alive to the fact that it can often be a subjective assessment reflecting personal experience, that may be unintentionally informed by implicit bias and even inappropriate stereotyping or myths. This may be particularly true in cases involving testimony of witnesses from different cultures and backgrounds, or where English is a second language and the evidence is received through an interpreter: *Fu v. Zhu*, 2018 BCSC 9 at paras. 39-42. However, while this caution is instructive, it does not "provide a license for a witness to lie": *Kim v. Choi*, 2019 BCSC 437 at para. 18.
- [32] As already noted, when pushed in oral submissions, plaintiffs' counsel advised he will be advancing an argument that Mr. Mand was a reliable and credible witness insofar as the critical material facts in issue, and in particular with respect to the critical evidence on some issues. He says the expert opinion of Dr. Parmar is necessary to assist me as it provides a medical basis for the manner in which he testified. They set out their argument clearly in the Amended NOA, as follows.
64. If the Court accepts that he has a cognitive impairment, the Court may be more inclined to accept that specified extracts ought to be disregarded without impugning the validity of other evidence of Mr. Mand which was not linked to any apparent confusion and which is consistent with the underlying documents and evidence of other witnesses.

65. The opinions expressed by Dr. Parmar will also assist the Court in evaluating:
- a) the reasons for which Mr. Mand gave evidence which is agreed by both parties to have been frequently contradictory;
 - b) the reasons for which Mr. Mand failed frequently and repeatedly to respond to questions put to him on cross-examination; and
 - c) the reasons for which Mr. Mand frequently failed to acknowledge that his evidence was incorrect or internally inconsistent.
66. If the Court accepts that he has a cognitive impairment and/or suffers from a consistent personality trait of impulsivity, the Court may be more inclined to accept that Mr. Mand was making genuine efforts to answer questions in an honest and forthright manner.
67. If the Court accepts that he has a cognitive impairment, the Court may also be more inclined to accept that Mr. Mand was not engaging in the following conduct alleged by Defendants' counsel, namely, "playing games with the Court", deliberately refusing to answer questions, and answering questions in a non-responsive manner for tactical reasons. This may affect the Court's overall conclusions as to Mr. Mand's credibility and the reliability of his evidence generally.
- [33] The plaintiffs rely upon three cases which they say address the admissibility of expert evidence respecting cognitive issues which may impact the credibility and reliability of a witness' testimony: R.P. at paras. 53-60; Kliman at paras. 63-68; Marquard at paras. 50-53. They say these cases support their position that expert evidence is admissible to show a witness suffers from a mental disability which affects his or her ability to testify reliably.

A. Admissibility of an Expert Report

- [34] Expert evidence is presumptively inadmissible. The party tendering expert evidence must establish its admissibility on a balance of probabilities: R v. Abbey, 2009 ONCA 624 at para. 71 [Abbey]. The leading decision on the admissibility of expert evidence is the decision of the Supreme Court of Canada in White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23 [White Burgess].
- [35] In White Burgess, Justice Cromwell set out a two-stage inquiry to determine the admissibility of expert opinion evidence. The first step is for the proponent of the expert opinion evidence to establish the following for the proposed expert opinion evidence to be admissible:
- a) relevance;
 - b) necessity in assisting the trier of fact;
 - c) absence of an exclusionary rule; and

d) existence of a properly qualified expert.

[36] The second step is a discretionary gatekeeping one, wherein the trial judge must balance the potential risks and benefits of admitting the evidence and decide whether the potential benefits of admitting the evidence justify the risks.

[37] I will deal with each of these steps in turn.

1. The Threshold Inquiry

[38] As set out above, at the first stage of analysis, the threshold inquiry, the proponent of the evidence must establish the threshold requirements of admissibility, being relevance, necessity, absence of an exclusionary rule, and a properly qualified expert. Evidence that does not meet these threshold requirements should be excluded. Relevance at this stage refers to logically relevant: *White Burgess* at para. 23. Logical relevance is "a requirement that the evidence have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence": *Gutfriend v. Case*, 2022 BCSC 2055 at para. 9. Expert evidence that does not satisfy this purpose will not satisfy the criteria of either relevance or necessity in assisting the trier of fact: *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109 at para. 13 [Maras].

[39] To be necessary, the expert evidence must be outside the experience and knowledge of the trier of fact, and must be necessary to assist them: *Marquard* at paras. 49-51. It must be assessed in liability of its potential to distort the fact-finding process: *R v. Mohan*, [1994] 2 S.C.R. 9, at paras. 23-25.

2. The Gatekeeping Inquiry

[40] At the second stage of the inquiry, the trial judge must perform a discretionary "gatekeeping" inquiry, and consider and balance the potential risks and benefits of admitting the expert opinion evidence, to determine whether the potential benefits of the evidence justify the risks: *White Burgess* at para. 24. This cost-benefit analysis is case specific and requires the exercise of judicial discretion.

[41] Justice Cromwell in *White Burgess* noted that the trend in the jurisprudence "has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role": para. 20. He set out this gatekeeping role in *White Burgess*:

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J. - L.J., Binnie J.* spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. *Doherty J.A.* summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial

process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

- [42] Although necessity, reliability and relevance are components of the threshold step, they are also a consideration at the gatekeeping inquiry: *White Burgess* at paras. 24, 54. The potential probative value of the proposed expert opinion, including its reliability, relevance and necessity, must be weighed against the potential harm to the trial process, which harm includes the consumption of time, prejudice, confusion, and the danger that the trier of fact will be unable to make an effective and critical assessment of the evidence: *Abbey* at paras. 89 - 91; *White Burgess* at paras. 24, 54. To allow expert opinion evidence, the trial judge "must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence": *White Burgess* at para. 54.
- [43] The second stage of the inquiry is an exercise of judicial discretion. The ultimate admissibility of an expert opinion, "even where it is essential", depends on the balancing of not only its potential benefit but also the potential prejudice to the trial process: *Abbey* at para. 94.

B. Abridgment of Time to Serve an Expert Report

- [44] Rule 11-6(3) of the Rules requires that unless the court otherwise orders, a party must serve an expert report at least 84 days before a scheduled trial. Rule 11-7(6) provides that the court may allow an expert to provide evidence, even if one or more of the requirements of Part 11 have not been complied with, if facts that could not, with due diligence, have come to the knowledge of a party, if non-compliance is unlikely to cause prejudice, or if the interests of justice require it.
- [45] It is accepted that delivering expert reports on the eve of trial is antithetical to the purpose of the Rules, which seeks to ensure that the parties have reasonable notice of expert opinions: *Perry v. Vargas*, 2012 BCSC 1537 at para. 19 [Perry]. It is yet another procedural rule to prevent "trial by ambush" and to ensure that a party receiving an expert report has sufficient time to evaluate the strength of the expert report, consider the appropriate response, and to assess the potential need to obtain a responding expert report: *Balingoay v. Dhindsa*, 2018 BCSC 2307 at para. 34; *Peace River Greenhouses Ltd. v. Taylor (District)*, 2016 BCSC 1448 at para. 25.
- [46] Abridging the time is an extraordinary step. When considering whether to exercise discretion to admit expert evidence if the interests of justice requires it, the context in which the admittance is sought is important: *Perry* at paras. 20-21. It is a discretion to be exercised sparingly, with caution, and in a disciplined manner. There must be a compelling analysis of why the interests of justice require the extraordinary step of abrogating the service requirements set out in the Rules: *Hoang v. Dean*, 2021 BCSC 537 at para. 34; *Maras* at para. 51; *Perry* at paras. 18-22.

V. ANALYSIS**A. The Threshold Inquiry**

- [47] The plaintiffs have the burden of establishing that the Parmar Report meets the threshold requirement of admissibility. The defendants say the report should be excluded on the basis of what they characterize as an exclusionary rule, and they say the plaintiffs have failed to establish it is either relevant or necessary. They do not argue that Dr. Parmar is not an appropriately qualified expert.
- [48] Notwithstanding Mr. Mand's significant difficulties in testifying in both direct and on cross-examination, plaintiffs' counsel nonetheless make clear they intend to argue he is a credible and reliable witness. They say that to reach the appropriate determination of his credibility is beyond my abilities as a trier of fact, without the Parmar Report admitted into evidence. They say if that report is admitted, then I may use her expert opinion to explain away his difficulties with testifying and his inconsistent and frequently confusing evidence, to conclude that he nonetheless provided me with credible evidence on the critical materials facts he must prove on a balance of probabilities to succeed in this litigation.
1. Absence of an Exclusionary Rule
- [49] Notwithstanding Dr. Parmar required Dr. Bhalla to assess Mr. Mand, and the Parmar Report clearly relied upon the Bhalla Report, the plaintiffs withdrew their application to have the Bhalla Report admitted into evidence. While plaintiffs' counsel conceded the Bhalla Report contained opinion evidence, they say it is not necessary to have the Bhalla Report admitted into evidence. They say it is not necessary for each medical opinion Dr. Parmar has relied upon to be admitted into evidence, as that is a matter that goes solely to weight.
- [50] However, upon a careful review of the Parmar Report, she clearly relied upon the neuropsychological testing results, which she required Dr. Bhalla to administer, interpret and provide his expert opinion on. Without the Bhalla Report in evidence as an expert report, the Bhalla Report is obviously hearsay evidence.
- [51] The plaintiffs argue that an expert may develop an opinion based upon their review of other's expert observations and opinions and research. To the extent their report is based on hearsay evidence, if the opinion is relevant, it is still admissible. The hearsay evidence, while not admissible to establish the truth of the facts, is admissible to show the facts upon which the opinion is based so the opinion can be evaluated. The hearsay evidence is not admissible to establish those facts: *R. v. John*, 2023 BCSC 597 at para. 40. The value of such an opinion may be affected by its reliance on second-hand source material.
- [52] The defendants agree with this legal proposition, but say that there is a risk of potential prejudice to cross-examining counsel where it is not possible to tell from an expert report which opinions are those of the author, and which are simply opinions of other doctors reported to her, and asserted to be true by her in her written report: *Dhaliwal v. Bassi*, 2007

BCSC 548 at paras. 7, 9. They argue that an expert opinion must be that "of an individual expert falling within the scope of their expertise, and not simply a report on the opinions of others": *Li v. Liang*, 2021 BCSC 862 at para. 187, citing *Heidebrecht v. Fraser-Burrard Hospital Society*, 15 B.C.L.R. (3d) 189 at 190-191, [1995] B.C.J. No. 2996 (S.C.).

[53] While it is clear Dr. Parmar required Dr. Bhalla to conduct neuropsychological testing, and that she relied upon his expert opinion, I am not satisfied that her report is such that it would cause a risk of procedural prejudice to cross-examining counsel. Rather, the issue would be, after cross-examination is complete, the appropriate weight to be put on her report. I do not find the report to be subject to an exclusionary rule that would render it inadmissible at the threshold stage.

2. Relevance and Necessity

[54] In their initial notice of application, the plaintiffs set out that they seek to rely upon Dr. Parmar's opinion:

- a) to assist the Court in evaluating the evidence of Mr. Mand;
- b) to respond to the defendants' repeated accusations at trial that Mr. Mand has been "playing games" with the Court and "making a fool" of everyone; of having a premeditated decision to falsify his evidence in certain circumstances; and deliberate refusals to answer the questions; and
- c) to rebut the defendants' anticipated argument that Mr. Mand for the plaintiffs must pay special costs as a result of Mr. Mand's allegedly deliberate misconduct.

[55] I do not accept that it is appropriate to consider a future anticipated costs argument for the admission of this expert evidence at trial at this time. To do so would be premature. Counsel acknowledged that is a "secondary ground". I note it may be appropriate to again consider the admissibility of the report or reports at the time costs arguments are being advanced, and the plaintiffs have leave to do so.

[56] As I have already set out, there is a clear framework to assist a trial judge in assessing credibility and reliability of witnesses.

[57] At the first stage of the White Burgess analysis, the plaintiffs must satisfy their burden of establishing that the Parmar Report is logically relevant to the issues I must determine. While this is a low threshold, it is nonetheless a burden the plaintiffs must satisfy. That is, they must establish that Dr. Parmar's opinion that Mr. Mand suffers from MCI, significantly exacerbated by his use of alcohol, and has an impulsive personality, is relevant to my ultimate determination of his credibility and reliability as a witness. The plaintiffs say the decisions in *R.P.*, *Kliman* and *Marquard* support their position that Mr. Mand's MCI, coupled with his alcohol use and impulsive personality, is relevant evidence that shows that he suffers from a medical condition which affects the manner in which he gave his evidence and so is relevant to my determination of his credibility and reliability.

- [58] With the greatest of respect, I cannot agree her expert opinion is either relevant or necessary to my ultimate determination of Mr. Mand's credibility and reliability as a witness. Counsel candidly acknowledged that they wished to attempt to use the Parmar Report to try to explain away the inconsistencies, contradictions, and failures to answer the questions asked, so that they can retain Mr. Mand's evidence on the critical material facts the plaintiffs must prove on a balance of probabilities. While in oral argument, plaintiffs' counsel did not shy away from the fact that they are attempting, after the fact, to enter expert evidence in the hopes that it would allow them to "cherry pick" the evidence they need to prove their case, they pulled back from this position in reply. Rather, they now say that with the benefit of the Parmar Report, I "will be better able to appreciate occasions on which Mr. Mand's answers, or failures to respond, were the product of cognitive impairment". They refer to the Parmar Report as being another tool in my tool kit for assessing Mr. Mand's credibility and reliability as a witness, and they argue that without it I "may be more inclined to misconstrue evidence given by Mr. Mand, leading to erroneous conclusions with respect to the actual underlying facts".
- [59] I start with the proposition that Dr. Parmar was clearly of the opinion Mr. Mand was capable of testifying. The plaintiffs admit this. While the Parmar Report may prove a relevant explanation of the underlying reason he had such serious difficulties as a witness, it does not provide me with any assistance in determining which of his evidence may have been given in such a manner because of his MCI, or because of his alcohol use, or because of his impulsive personality, or for some other unrelated reason. Neither does it say all episodes of Mr. Mand's confusion must be the result of his MCI. While counsel set out numerous examples where he appeared to be confused, the Parmar Report does not provide me with medical evidence to allow me to conclude that all episodes of confusion were inevitably the result of his MCI. It provides me with no assistance in that regard. Nor, with respect to his alcohol use, or his impulsive personality, is it appropriate to consider the why behind his failures as a witness. Neither are a mental disability which affects his ability to testify reliably. I find the Parmar Report is neither relevant nor necessary to my necessary ultimate determination of what, if any, of his evidence I may ultimately accept as being credible and reliable.
- [60] Her opinion cannot assist me in determining when exactly during his lengthy testimony he suffered from the consequences of MCI, when he was confused for other reasons, when he was perhaps being impulsive, nor when he perhaps drank alcohol the night before he testified. Mr. Mand himself repeatedly stated during his testimony that he understood the questions, and he was responding to the questions. There was no evidence tendered on this application from Mr. Mand that at any point during his testimony he felt he was suffering from complications of MCI, or even that he felt he was confused. In my opinion, the Parmar Report is neither necessary nor logically relevant to my assessment of Mr. Mand's credibility and reliability, nor to my ultimate determination of which of his evidence I may ultimately accept. It does not make the existence or non-existence of a material fact in issue more likely than it would be without the expert evidence.

- [61] Further, I must also note, her report makes recommendations for obtaining Mr. Mand's testimony, all of which were in fact utilized in any event by both counsel and I through the approximately 21 days he was on the stand. In one way or another, these recommendations were all incorporated throughout his lengthy testimony. Dr. Parmar makes no recommendation on how to consider his evidence after such accommodations were given. The Parmar Report provides no assistance to me in determining how to weigh and consider his evidence when I ultimately determine whether he was credible or reliable, and whether to accept all, some or none of his evidence. It does not provide me with useful practical information, outside my experience and knowledge, to assist me in conducting my credibility determination of Mr. Mand.
- [62] In final argument, counsel for the plaintiffs will be able to argue, as in any other case, why I should parse Mr. Mand's evidence, and will be able to argue that I should accept some portion of his evidence. They will be able to argue that I should ignore areas where he appeared to be confused. Not allowing the Parmar Report into evidence does not impact counsel's ability to advance such an argument. Nothing in these reasons for judgment impacts the ability to make those arguments.

B. The Gatekeeping Inquiry

- [63] To be complete, notwithstanding my determination that the plaintiff has failed to satisfy the threshold inquiry, I will also briefly consider the necessary gatekeeping inquiry. This second stage was described in *White Burgess* as a balancing exercise, in which the trial judge must balance the potential risks and benefits of admitting the evidence, to determine whether the potential benefit is sufficient to justify the risk: at para. 43.
- [64] Trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence: *Maras* at para. 14. They must be satisfied that the benefits of admitting the evidence outweigh its potential risks. I am not satisfied that they do in the circumstances.
- [65] It is beyond doubt that should I allow the Parmar Report into evidence, not only would she be required to attend for cross-examination, but the defendants would also have the right to consult their own medical expert before they conducted a cross-examination of Dr. Parmar. They may ultimately decide they must retain their own expert, have Mr. Mand assessed, and tender their own responsive report. All of this would inevitably take a lengthy period of time, and would require further trial time. I cannot accept the plaintiffs' argument that the prejudice is not significant. The result would be to require further steps to be taken by the defendants, further judicial resources, and a further delay of a final determination on the merits of this matter. I accept the defendants' argument that given the limited nature of Dr. Parmar's opinion, and the lack of assistance it provides me in determining Mr. Mand's ultimate credibility and reliability, it is not sufficiently beneficial to warrant its admission despite the prejudice to the defendants and the serious potential harms to the trial process. On that basis, I would have exercised my discretion to exclude the Parmar Report from evidence pursuant to my gatekeeping role as well.

C. Abridgment of Time to Serve an Expert Report

- [66] Finally, I will briefly address the plaintiffs' argument that there are compelling reasons justifying the extraordinary step of abrogating the service requirement for expert reports set out in Part 11 of the Rules.
- [67] The defendants acknowledge that this matter could not have been foreseen by the plaintiffs, and arose unexpectedly during Mr. Mand's testimony, and do not argue that the plaintiffs are engaging in a trial by ambush. Notwithstanding that, I agree with counsel for the defendants that the lack of notice by the plaintiffs of their intention to serve the expert reports, at the time when counsel were addressing my direction to work collaboratively to schedule witnesses, is troubling.
- [68] I have repeatedly stated my concerns that this trial is not proceeding in a manner proportionate to the matters in issue, nor in accordance with the objects set out in R. 1-3 of the Rules. Trial management powers are one way in which trial judges may control the process of their court, and ensure that trials proceed in an effective and orderly fashion. That power has three interrelated purposes: to ensure that trials proceed fairly, effectively and efficiently: *R. v. Samaniego*, 2022 SCC 9 at paras. 20-21.
- [69] As I have stated previously on other occasions in this trial, when I make directions or orders using my trial management power, the parties must comply with those court orders. If they fail to do so, their failure may attract consequences.
- [70] The orders I made at the judicial management conferences in the spring of 2024 were clear and were to aid in an efficient trial process for the balance of this long trial. On June 5, 2024, I ordered the plaintiffs to provide a draft schedule of the remainder of their witnesses by the end of the day June 12, 2024. On June 12, 2024, the plaintiffs were in possession of the draft reports, and so were in a position to provide meaningful notice to this Court and to the defendants that it was highly likely they would be serving reports, and to advise of the specific medical specialties of the two doctors. They chose not to, but instead provided a witness schedule that included neither doctor nor this application. At an absolute minimum, in my opinion, they should have advised defence counsel that they were not in a position to provide an accurate witness schedule. Rather, they sent a witness schedule in accordance with my order, and then served the reports June 20, 2024. This was the first time they gave the defendants any notice of what has become a significant issue. They did not provide their draft updated schedule of witnesses showing this application and the potential attendance of Dr. Parmar and Dr. Bhalla to the defendants until Sunday, June 23, 2024. That decision failed to comply with the clear trial management order I made. I have repeatedly made clear throughout this trial that my trial management orders are to be adhered to. While the defendants do not argue that this is a trial by ambush, in my opinion, it comes very close.

[71] In the totality of the circumstances of this proceeding, that behaviour is not acceptable. As a result, in that context, I would not have exercised my discretion to grant the extraordinary order of abridging the time necessary to serve the Parmar Report, in any event.

VI. CONCLUSION

[72] The plaintiffs' application is dismissed.

[73] As these were oral reasons, they have been edited where necessary and quotes from the caselaw have been inserted, but the overall substance and result has not changed.

"Blake, J."

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