

CANADA / JUDGMENT

R. v. Ali

2023 BCSC 2456

COURT

Supreme Court of British Columbia

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2023 BCSC 2456 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2023 BCSC 2456

Date: 20230307

Docket: 29405

Registry: Vancouver

Rex

v.

Ibrahim Ali

Restriction on Publication: Pursuant to s. 486.4(2.2) of the Criminal Code of Canada, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

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Restriction on Publication: Pursuant to this Court's inherent jurisdiction, no information regarding the circumstances of the death of trial witness Tracy Pickett shall be published in any document or broadcast or transmitted in any way.

Before: The Honourable Mr. Justice Bernard

Oral Ruling on Voir Dire 9

re expert qualification of Dr. Tracy Pickett

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Place and Date of Hearing:

Vancouver, B.C.

January 9-10, 12-13, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 7, 2023

1. Introduction

- [1] THE COURT: Ibrahim Ali is on trial for the murder of 13-year-old MS, alleged to have occurred on July 18, 2017, in Central Park, Burnaby, British Columbia. The charge against him is murder in the first degree because it is alleged that MS's death was caused by Mr. Ali while he was sexually assaulting her.
- [2] The case against Mr. Ali rests principally on a match between his DNA and a DNA sample taken from semen found inside MS's vagina and anus in the post-mortem examination of MS's body.
- [3] At Mr. Ali's jury trial, the Crown seeks to call as a witness Dr. Tracy Pickett as an expert in sexual assault examinations, emergency medicine and forensic medicine, and qualified to provide opinion evidence in the following areas:
- a) the identification and interpretation of MS's injuries;

- b) the likely cause and mechanism of these injuries and the age of these injuries, including whether they were antemortem, perimortem, or post-mortem;
 - c) the positioning of the vagina within the female body and the circumstances in which semen will either remain inside it or leak from it; and
 - d) MS's physical development, including whether she had reached puberty.
- [4] The Crown expects that in accordance with her qualifications, Dr. Pickett would provide the following opinion evidence:
- a) that the constellation of injuries is strongly suggestive of non-consensual sexual activity;
 - b) that the injury to MS's vaginal opening is a significant injury, highly indicative of blunt trauma inflicted during penetration with a relatively large object such as a penis, that it is not likely that a finger or recently-inserted tampon would cause the degree of injury noted, and that the redness on MS's cervix may be associated with recent trauma;
 - c) that the combination of a contusion deep within the rectum and several grouped anal lacerations is suggestive of trauma from penetration, that these injuries are not suggestive of being caused by normal toileting, hygiene, or constipation, and that there is no evidence of chronic anorectal disease;
 - d) that the laceration of the vagina introitus and the rectal contusion are injuries that occurred antemortem, and the anal lacerations occurred either antemortem or perimortem;
 - e) that due to the female anatomy and gravity, seminal fluid that has been deposited in a vagina will leak out of the vagina when the female is standing upright; and
 - f) various other related opinions, including that the blood on MS's buttocks was from the vaginal laceration and that MS had "normal" adult female genitalia.
- [5] Mr. Ali is opposed to the admission of Dr. Pickett's evidence, principally on the basis that its prejudicial effect outweighs its probative value. Accordingly, a voir dire was declared to determine its admissibility.

2. Voir Dire Evidence

- [6] Dr. Pickett was the sole witness in the voir dire. She was led through her curriculum vitae (Voir Dire Exhibit #1) as to her relevant education, training, and experience. The following is a brief synopsis:

- Dr. Pickett obtained her medical degree from the University of British Columbia in 1995. In October 2014, she obtained a master's degree in forensic medicine from Monash University in Melbourne, Australia.

- Dr. Pickett is presently a clinical professor in the UBC Faculty of Medicine, in the Department of Emergency Medicine. She has held this position since 2016, and has taught in the Department of Emergency Medicine since 2001.
 - Dr. Pickett has been a fellow in the Royal College of Physicians and Surgeons of Canada Residency Program in Emergency Medicine since 2000, and a founding fellow in the Faculty of Clinical Forensic Medicine from Royal College of Pathologists of Australia since 2015.
- [7] In Dr. Pickett's report, she describes clinical forensic medicine as medicine at the interface of the law as applied to living patients and that covers documentation of aspects of interpersonal conflict, "traffic" medicine, and toxicology.
- [8] Dr. Pickett has completed post-graduate course work on many topics, including injury interpretation (2013), adult sexual assault (2014), and non-accidental injury in childhood (2014), among others. Her continuing medical education has included a sexual assault examiner course (2013) provided by the B.C. Women's Hospital Sexual Assault Service (SAS). She has also taken courses on strangulation prevention and medical-legal workshops for sexual assault physicians. Dr. Pickett has practised emergency medicine in hospitals in the Lower Mainland since 2000, and currently works one-to-two days per week in that capacity at Vancouver General Hospital and UBC Hospital. She also works as a physician for the Vancouver City jail.
- [9] Dr. Pickett estimates that as an emergency room physician, she has seen or treated approximately 30,000 patients and has conducted a great many anogenital exams including at least 1500 vaginal exams and about 1500 anal/rectal exams, for injuries. She routinely examines adolescents for genital injuries.
- [10] Dr. Pickett's primary professional role is as the medical director of the SAS at B.C. Women's Hospital and Health Centre in Vancouver. This is a position she has held since September 2015. As medical director, Dr. Pickett is responsible for running this program, overseeing the education and training of sexual assault examiners, and participating in teaching. Dr. Pickett has run the B.C. Women's Hospital Sexual Assault Examiner Training course, and has presented on strangulation injuries and injury identification, sexual assault, including adolescent sexual assault. Most of Dr. Pickett's clinical instruction incorporates sexual assault injury interpretation and aging.
- [11] At the SAS, Dr. Pickett also assesses patients age 13 and over who report that they have been sexually assaulted within the previous week, including for forensic purposes. Assessments include patient medical care and the taking of forensic samples and documentation of injuries reported by patients. Dr. Pickett has examined over 300 patients at the SAS and has completed more than 250 forensic evaluations on those patients.

- [12] Dr. Pickett has testified at least three times in B.C. courts as a sexual assault expert and twice as a medical doctor. She is sometimes retained by defendants charged with sexual assault to provide her opinion on injury interpretation and sexual assault care. In such cases, she does not usually see the patient. The opinion is based on photographs and other materials provided by defence counsel.
- [13] Dr. Pickett is on the roster of experts of the International Criminal Court in the Hague (in emergency medicine, clinical forensic medicine, and sexual assault and strangulation injury) although she has not testified in that capacity.
- [14] Dr. Pickett testified that she has reviewed extensive medical literature regarding sexual assault injury, interpretation, and the aging of these injuries.
- [15] Crown counsel engaged Dr. Pickett to prepare an expert report (see Voir Dire Exhibit #2) setting out her opinions on the following issues:
- a) whether the injuries noted appear to be consistent with consensual or non-consensual sexual activity;
 - b) the likely mechanics which resulted in the specific genital injuries;
 - c) the likely positioning of the body during the course of the injuries being sustained; and
 - d) whether the vaginal and anal injuries appear to be ante or post-mortem.
- [16] Dr. Pickett's report includes an attestation by her acknowledging that her role as an expert is to assist the court and not to be an advocate for any party, and that she prepared the report in accordance with that duty. Dr. Pickett also acknowledged this duty in her voir dire testimony.
- [17] Dr. Pickett testified that in forming the opinions in her report, she did not personally examine MS's body. The factual underpinnings to her opinions are the crime scene and autopsy photos, the post-mortem reports and notes of the forensic pathologist, Dr. Jason Morin, the neuropathology report of Dr. Stephen Yip, and the toxicology report.
- [18] Dr. Pickett's testimony, which is consistent with her report, is that her opinions are based upon her significant clinical experience and her familiarity with relevant peer-reviewed medical literature.

3. Legal Principles

- [19] The analytical framework governing the admissibility of expert evidence is found in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess]. This was substantially drawn from the decision of Mr. Justice Doherty in *R. v. Abbey*, 2009 ONCA 624 [Abbey #1]. The evolution of the framework and the current White Burgess test were succinctly summarized by Mr. Justice Laskin in *R. v. Abbey*, 2017 ONCA 640 [Abbey #2] at paras. 46-49:

[46] The modern Canadian law on the admissibility of expert evidence began with the judgment of Sopinka J. in *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9. But in the last two decades since *Mohan* was decided the law on expert evidence has changed significantly. In *Abbey #1* itself - on the Crown's appeal from the acquittal at the first trial - my colleague Doherty J.A. reformulated the *Mohan* test for admissibility to make it easier to apply. And recently in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, Cromwell J. adopted with "minor adjustments" Doherty J.A.'s reformulation of *Mohan*.

[47] The test in *White Burgess* is now the governing test for the admissibility of expert evidence. It adopts a two-stage approach, first suggested in *Abbey #1*: the first stage focuses on threshold requirements of admissibility; the second stage focuses on the trial judge's discretionary gatekeeper role. Each stage has a specific set of criteria.

[48] The test may be summarized as follows:

Expert evidence is admissible when:

(1) It meets the threshold requirements of admissibility, which are:

- a. The evidence must be logically relevant;
- b. The evidence must be necessary to assist the trier of fact;
- c. The evidence must not be subject to any other exclusionary rule;
- d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
 - i. Impartial,
 - ii. Independent, and
 - iii. Unbiased.
- e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

- (2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:
 - a. Legal relevance,
 - b. Necessity,
 - c. Reliability, and
 - d. Absence of bias.

- [49] In short, if the proposed expert evidence does not meet the threshold requirements for admissibility it is excluded. If it does meet the threshold requirements, the trial judge then has a gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied then the expert evidence may be admitted; if the trial judge is not so satisfied the evidence will be excluded even though it has met the threshold requirements.
- [20] The first step of the analysis requires the party seeking to tender the expert evidence to establish, on a balance of probabilities, the four criteria for threshold admissibility: *R. v. Scott*, 2018 BCSC 2562, at para. 30. If the proposed expert evidence meets the threshold requirements, trial judges must exercise their discretionary gatekeeping function by balancing the potential risks and benefits of admitting the evidence, to ensure the evidence enhances rather than distorts the fact-finding process: *White Burgess*, at para. 24; *R. v. Bingley*, 2017 SCC 12 [Bingley], at para. 13.
- [21] The importance of this gatekeeping role has been emphasized in the jurisprudence, ensuring that proposed expert evidence is scrutinized at the outset, and not permitted too easy an entry on the basis that any frailties can be assessed based on weight rather than admissibility: *Abbey #2*, at para. 53.

4. Positions of the Parties

The Crown

- [22] The Crown submits that Dr. Pickett's expert evidence should be admitted, as she is properly qualified to give the proposed opinion evidence by virtue of her education, training, experience, and knowledge of the relevant literature, and she is willing and able to give the evidence in accordance with an expert's duty of independence and impartiality. Further, the proposed opinion evidence is highly relevant to matters at issue in the trial, is necessary to assist the jury to understand and correctly judge those matters, and, on balance these benefits substantially outweigh any risk of prejudice in admitting the evidence.

Mr. Ali

- [23] Mr. Ali submits that the court should refuse to admit Dr. Pickett's opinion evidence because it is unnecessary; it consists of conclusions and common sense inferences the jury is capable of drawing without the assistance of an expert. Mr. Ali says the proposed evidence is simply a repackaged version of the findings and conclusions that will be tendered through Dr. Morin, and that a real danger exists that the jury would accept Dr. Pickett's expert views rather than making its own independent assessment.
- [24] Mr. Ali further submits that Dr. Pickett's opinion evidence should be excluded on the basis that she is not an impartial witness. He says she is an advocate for alleged sexual assault victims and would not carry out her duty to the court as an expert.

- [25] Mr. Ali also argues that Dr. Pickett's evidence has little probative value and a real potential to distort the fact-finding process.
5. Analysis
- (a) The four Threshold Factors
- i. Logical Relevance to a Fact in Issue
- [26] The concept of relevance at the threshold stage refers to logical relevance; whether the proposed evidence is logically probative of a fact in issue. Evidence that is logically relevant will "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": Abbey #1, at para. 82.
- [27] In order to prove first-degree murder in the case at bar, the Crown must establish beyond a reasonable doubt, inter alia, that Mr. Ali caused MS's death while he was sexually assaulting her. The Crown's theory is that Mr. Ali attacked MS as she was running along a trail in Central Park, and then dragged her off the trail and into a wooded area where he sexually assaulted and killed her.
- [28] Mr. Ali has stated that in his defence he will testify that he and MS had consensual sexual intercourse at an earlier time and in a different location to that which the Crown alleges as the time and place of the alleged murder. It is understood that this testimony would be his explanation for the presence of semen inside MS that has been linked to him by DNA analysis.
- [29] In these circumstances, I am satisfied that Dr. Pickett's proposed opinion evidence is logically relevant to the following trial issues:
- a) whether MS was sexually assaulted in the course of a murder or not; and
- b) whether the accused, Ibrahim Ali, was MS's killer or not.
- [30] Dr. Pickett's opinion that the constellation of the injuries to MS's body is strongly indicative of non-consensual sexual activity is probative to the issue of whether she was sexually assaulted. Her opinion that semen normally leaks out of a vagina once a person is standing or moving around, when combined with evidence of pooled semen found inside MS's vagina at the scene and the lack of semen found on her clothing or thighs, is probative of when and where the semen was deposited: i.e., at the murder scene or at another place and time.
- [31] Notably, other courts have found this type of evidence to be probative. In R. v. Iverson, 2014 BCSC 2400, at para. 179, Justice Punnett listed the factors that may be considered, depending on the evidence, in relation to the issue of consensual sexual contact in the context of s. 231(5) of the Criminal Code, including the presence of semen and the absence of evidence of leakage.

[32] Mr. Ali's submissions regarding relevance focus on the issue of legal relevance, which is considered at the gatekeeping stage and will be discussed below: Abbey #1, at para. 84; Abbey # 2, at para. 48.

ii. Necessity to Assist the Trier of Fact

[33] To be admissible, expert evidence must be necessary to assist the trier of fact, in that it provides information likely to be outside the experience and knowledge of a judge or jury: R. v. Mohan, [1994] 2 S.C.R. 9, 1994 CanLII 80 [Mohan], at para. 23.

[34] The subject matter to which the expert evidence relates must be such that it is unlikely that an ordinary person would be able to truly understand a matter in issue without the assistance of someone with specialized expertise: Mohan, at para. 23

[35] Mr. Ali submits that Dr. Pickett's proposed evidence is unnecessary to assist the jury because it consists merely of common-sense information and opinions that are squarely within the capacity of the trier of fact to decide without the assistance of an expert. By example, Mr. Ali asserts that Dr. Pickett's opinion that the contusions on one of MS's arms are consistent with her having been forcibly grabbed, is a finding the jury could reach without expert opinion evidence.

[36] In this regard, the courts in other cases have admitted expert evidence in relation to the location of injuries and semen, on the basis that it was necessary to assist the trier of fact in deciding whether a sexual encounter was consensual or not. The Crown noted the following decisions:

- a) R. v. Steinbach, 111 BCAC 231, at para. 15: The court upheld the admissibility of the opinion evidence of the doctor who examined the complainant. The court found it to be clear that, by reason of his breadth of experience and knowledge, the doctor was qualified to express an opinion concerning the injuries he saw in the vaginal area, and that members of the jury could not be expected to have expertise in this area: para. 11.
- b) R. v. Liu, [2004] O.J. No. 4221, 2004 CanLII 34061 (Ont. C.A.): The court upheld the admission of the expert evidence of an emergency room physician who testified that the injuries to the deceased's genitalia were indicative of non-consensual sex: para. 17. The expert evidence was found to be necessary, as members of the jury could not be expected to have expertise concerning injuries to the vagina: para. 19.
- c) R. v. Hall, 2010 ONCA 724: The court upheld the admission of opinion evidence of the forensic pathologist who testified that seminal fluid deposited inside the vagina can flow out of the vagina due to gravity, and that one would expect leakage of deposited semen to occur following intercourse if the woman were upright and walking around: paras. 66 to 70.

- d) Finally, recently in *R. v. Tsang*, 2022 BCCA 345, our appellate court considered the admissibility of evidence of a medical expert who was qualified to say whether the injuries she saw were consistent with the sexual assault as reported by the complainant. The court confirmed that opinion evidence that the injuries were inconsistent with consensual sex was admissible, subject to a substantial consideration of the expert's experience and research, and cautious use to ensure the evidence has probative value: para. 105.
- [37] The real question here is not whether a jury could determine the cause of an injury such as an upper arm bruise without an expert opinion, but rather whether they could reasonably interpret without expert assistance, the constellation of injuries to MS's body, including those to the vagina and anus, in relation to whether a sexual encounter was consensual or not.
- [38] In this regard, I am satisfied that the assistance of an expert is necessary. I am also satisfied that expert evidence is necessary in relation to semen deposits, leakage, and the significance of such to matters the jury will be called upon to decide. While there is undoubtedly a general human familiarity with our bodily fluids and injuries, there are aspects to these matters that may well be beyond the knowledge and experience of the jury.

iii. Other Exclusionary Rules

- [39] Expert evidence will not be admissible if it is subject to an exclusionary rule independent of the rule against opinion evidence: *Mohan*, at para. 25. No other exclusionary rule has been identified here and I am satisfied that, in these circumstances, there are none.

iv. Proper Qualification of the Expert

- [40] Opinion evidence must be given by a properly qualified expert: i.e., a person who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters of which he or she undertakes to testify: see *Mohan*, at para. 25. The proposed witness must have expertise in the area on which they will opine, and it must be in relation to a matter that is outside the experience and knowledge of the trier of fact: *Bingley*, at para. 19. A witness may acquire expertise through on-the-job experience, formal education, or a combination thereof. The acquisition of knowledge and experience through practise does not, on its own, diminish its value: *R. v. Mills*, 2019 ONCA 940, at para. 52.
- [41] Dr. Pickett's expertise, described in detail above, was acquired through the following:
- a) her medical education, including her specialization in emergency and forensic medicine, and, her training in injury identification and interpretation and in sexual assault examination;
 - b) her extensive practice experience as an emergency room physician conducting thousands of anogenital examinations, including vaginal and rectal examinations;

- c) her experience, as medical director of the SAS, in overseeing education and training of sexual assault examiners, in clinical instruction, and in conducting her own examinations of individuals who report they have been sexually assaulted, including examinations for forensic purposes;
- d) her additional and ongoing training in relevant subjects; and
- e) her extensive review of medical literature regarding sexual assault injuries and the interpretation and aging of those injuries.

[42] I am satisfied that Dr. Pickett has acquired specialized knowledge on the subject-matter of her proposed testimony, and that it is likely beyond the experience and knowledge of the jury. Specifically, Dr. Pickett's expertise allows her to proffer opinions in relation to the five areas identified by the Crown.

[43] Mr. Ali's principal submission under this threshold factor is that Dr. Pickett lacks the requisite impartiality to fulfil her duty to the court because she aligns herself with and advocates for people she believes to be victims of sexual assault. Mr. Ali argues that this lack of impartiality was demonstrated in Dr. Pickett's testimony.

[44] At the threshold stage, the court is to consider the independence and impartiality of the proposed expert. An expert who is unable or unwilling to fulfil the duty of fairness, independence, and impartiality is not properly qualified to give expert opinion evidence. This threshold requirement is, however, not onerous. Once an expert has attested or sworn under oath that they acknowledge and accept their duties as an expert, the burden shifts to the party opposing the admission of the expert evidence to show a realistic concern that the expert's evidence should not be admitted on the basis that the expert is unwilling or unable to comply with their duties. An expert who assumes the role of an advocate for a party is clearly unwilling or unable to carry out their duties to the court. However, exclusion at the threshold stage will be rare and only occur where there is very clear evidence of an unwillingness or inability to provide fair, objective, and non-partisan evidence. Anything less should be taken into account at the gatekeeping stage, in the overall weighing of the costs and benefits of admitting the evidence: *White Burgess*, at paras. 46-53.

[45] As already noted, Dr. Pickett acknowledged and accepted her duties as an expert in her report and in her testimony. She also testified that she has provided opinions for the defence (in other cases) in relation to injury interpretation and sexual assault care. In cross-examination, Dr. Pickett did not agree that she was directly involved with any advocacy on behalf of sexual assault victims, or that the nature of her work would prevent her from providing impartial and objective testimony. She confirmed that as a physician she accepts whatever a patient reports, for the purposes of an exam and regardless of the injuries, and uses what she is told to assess and help the patient. She explained that this practice does not involve making a judgment call about whether a criminal offence occurred or not.

[46] In sum, on the evidence presented, I am satisfied that Dr. Pickett meets the criteria for a properly-qualified expert. There is insufficient evidence of bias or partiality to preclude the admission of her evidence at this threshold stage.

v. Novel Science

[47] At the threshold stage, expert evidence based on a novel scientific theory or technique is subjected to special scrutiny to determine whether the underlying science meets the basic threshold of reliability: Mohan, at para. 25; Bingley, at para. 15. Mr. Ali has submitted that because Dr. Pickett did not examine MS's body herself and has never before opined in relation to injuries of a deceased person, her opinion qualifies as novel science. Mr. Ali relies on R. v. Calnen, 2015 NSSC 330 [Calnen], as authority for his submission.

[48] In Calnen, the court considered the admissibility of the expert evidence of a forensic medical examiner regarding the expected outcome of a fall down a stairway, including the type of injuries expected to result from such a fall. In forming an opinion, the medical examiner relied on a video and photographs of the stairway, accounts of the accused and other witnesses of the alleged fall, reference literature, and the examiner's own experience in autopsies arising from fatal falls down a flight of stairs.

[49] In Calnen, the deceased's body was unavailable for examination and there were no photographs or other materials documenting any injuries. The court found that in these circumstances, the opinion was not what one might normally expect from a forensic medical examiner: see para. 32. Moreover, the court found the proposed expert's opinion to be speculative and not on point (given the lack of a body), and queried whether an engineer or kinesiologist might be better qualified to fashion the opinions sought: para. 39. The court concluded that the proposed opinion was based on a rather novel technique that had inherent dangers and did not meet the basic threshold of reliability for admission: para. 41.

[50] In my view, Calnen is materially distinguishable from the present case. In Calnen, the proposed medical expert was being asked to opine on the manner of death of the deceased and the expected injuries without the benefit of any actual medical evidence and with the use of techniques falling outside the scope of the medical examiner's expertise. In the case at bar, neither the science nor the techniques underlying Dr. Pickett's opinion are novel, and thus there is no need for special scrutiny. It is not uncommon for experts to base their opinions on photographs, records, reports, and the findings of other persons such as examining physicians. Moreover, it is not evident how Dr. Pickett's lack of experience in examining deceased persons gives rise to an argument that she has used novel science or techniques in the formulation of her opinions. In her testimony, Dr. Pickett acknowledged certain limitations to her opinions as a result of not having examined MS's body; however, I am satisfied that this would be relevant to the weight to be given to her opinions and not to their admissibility.

(b) Discretionary Gatekeeping Stage

- [51] In *White Burgess*, at para. 54, Justice Cromwell described the inquiry for the trial judge at the gatekeeping stage:
- [54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the 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.
- [52] Mr. Justice Watt summarized the inquiry of the gatekeeping stage in *R. v. M.C.*, 2014 ONCA 611, at paras. 77-79:
- [77] Evidence that meets the *Mohan* criteria will not necessarily be received and available for consideration by the trier of fact. At the second stage, the trial judge exercises a "gatekeeper" function. The judge decides whether the expert opinion evidence is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to that same process that may ensue from the introduction of that very evidence: *Abbey*, at para. 76. It is only where the benefits gained by the introduction of the evidence predominate over the costs associated with its introduction that the evidence will be admitted.
- [78] To determine the "benefits" associated with the introduction of expert opinion evidence, the judge considers the probative value of the evidence, the significance of and the issue to which the evidence is relevant. Potential probative value includes an assessment of the reliability of the evidence, not merely of its subject-matter, but also the expert's methodology, expertise and objectivity: *Abbey*, at para. 87.
- [79] On the "cost" side, the trial judge considers the consumption of time, prejudice and confusion. The trier of fact may not be adequately equipped to effectively and critically assess the evidence. The underlying material may be complex, the witness' jargon impenetrable, and the evidence resistant to effective cross-examination: *Abbey*, at para. 90.
- [53] In *Abbey #1*, at para. 79, Mr. Justice Doherty highlighted the discretionary nature of the admissibility decision:
- [79] The "gatekeeper" inquiry does not involve the application of bright line rules, but instead requires an exercise of judicial discretion. The trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence. This cost-benefit analysis is case-specific and, unlike the first phase of the admissibility inquiry, often does not admit of a straightforward "yes" or "no" answer. Different trial judges, properly applying the relevant principles in the exercise of

their discretion, could in some situations come to different conclusions on admissibility.

i. Relevance

- [54] Relevance at the gatekeeping stage refers to "legal relevance", which means the proposed evidence must be sufficiently probative to justify its admission: *Abbey #2*, at para. 48.
- [55] Mr. Ali submits that the proposed evidence lacks probative value, citing *R. v. Sekhon*, 2014 SCC 15 [Sekhon], at paras. 49-51, in support. He argues that Dr. Pickett's testimony is based on anecdotal evidence from her examination of patients. In *Sekhon*, the Supreme Court of Canada ruled that a police officer's expert evidence that he had never countered a "blind" drug courier over the course of his investigations, was irrelevant to the determination of whether Mr. Sekhon knew that he was transporting drugs based on the evidence in that particular case. The Court held that admitting such evidence would have a prejudicial effect because of: (a) the superficial attractiveness of seeming to show that the probabilities were in the Crown's favour; and (b) the fact that the evidence came from the mouth of an expert.
- [56] Mr. Ali suggests that Dr. Pickett's evidence might similarly mislead jurors into believing that, based on Dr. Pickett's experience with other patients, it is probable that the sexual intercourse in this case was non-consensual.
- [57] In my assessment, Dr. Pickett's proposed evidence is qualitatively different than the impugned evidence in *Sekhon*. Dr. Pickett's opinions are supported by peer-reviewed medical literature and not anecdotal evidence. Moreover, her opinions are not generalizations; rather, they are anchored to the evidence in this particular case: i.e., there is no real risk of the jury making their findings based on probabilities.
- [58] Mr. Ali further submits that Dr. Pickett's evidence is prejudicial because she cannot say that MS's injuries are inconsistent with rough consensual sexual activity. However, I am not satisfied this is a sound basis for denying its admission. It is open to Mr. Ali to cross-examine Dr. Pickett on the limitations of her opinions, to undermine their weight. So long as her testimony is in the areas of opinion in which she has been qualified to testify, I see no realistic potential for prejudice.
- [59] In my assessment, Dr. Pickett's evidence is highly probative and, as such, would benefit the trial process. The issues to which it relates are central to the case and there appears to be little, if any, risk of prejudicial effect.

ii. Necessity

- [60] At the gatekeeping stage, the focus of the necessity inquiry is whether there is a risk that the proposed expert evidence could lead the trier of fact to relinquish its decision-making role by simply relying on the inferences and conclusions of the witness, instead of engaging in its own critical assessment of the evidence. Relevant considerations include whether the material underlying the proposed evidence is complex, whether the witness's jargon is impenetrable, and whether the evidence is resistant to effective cross-examination.

- [61] Mr. Ali argues that his inability to access Dr. Pickett's patient records due to patient confidentiality renders her opinions resistant to cross-examination. I am unable to agree with this submission. Dr. Pickett's examination of patients is only one aspect of her knowledge and experience upon which she draws for her opinions, and she can be questioned about her examination of patients. Their identities are irrelevant and she readily acknowledges that she cannot testify as to the truth of what they reported to her regarding consent or its absence. Dr. Pickett has also studied relevant peer-reviewed literature to which Mr. Ali has access. He has access to all the materials Dr. Pickett relied on to form her opinion, including Dr. Morin's report and notes, photos of the scene and the autopsy, and the neuropathology and toxicology reports. Mr. Ali is not precluded from conducting a robust cross-examination of Dr. Pickett as a consequence of non-disclosure of confidential patient records or from demonstrating that absence of access to these records somehow undermines her testimony.
- [62] Mr. Ali also submits that Dr. Pickett's evidence is unnecessary because Dr. Morin, on whose report Dr. Pickett relies, is capable of giving similar evidence. In this regard, it is not contentious that Dr. Morin may have similar expertise in some areas and may thus be capable of opining on some of the same issues, including female anatomy, semen leakage, the cause and mechanism of injuries, and the aging of injuries. However, Dr. Pickett's proposed evidence is not expected to be duplicative of Dr. Morin's testimony.
- [63] Dr. Pickett's specialized expertise in the area of sexual assault complaint examinations, including injury interpretation, makes her better suited to assist the trier of fact with the sexual assault issue in this case. There is no evidence that Dr. Morin has specialized expertise in the area of sexual assault injuries. Mr. Ali did not cite authority for the proposition that a party is required to elicit all proposed opinion evidence on a particular topic through one expert witness if that witness's expertise arguably allows them to opine on the topic. In the absence of such authority, I am not persuaded that this is a sound basis for finding Dr. Pickett's evidence inadmissible.
- [64] It is not contentious here that unnecessary and excessive resort to expert evidence is to be avoided because it can give a distinct advantage to the Crown as the party with the resources to hire the most and best experts: see *Abbey #1*, at para. 91. However, in this case, a layering of opinions on the same issue is not a pressing concern. Here, it is anticipated that Dr. Morin will testify first, to explain his findings and give opinions in his area of forensic pathology. This will likely narrow the scope and reduce the length of Dr. Pickett's direct examination, and not inject complexity or unduly lengthen the trial.
- [65] There is no realistic concern that Dr. Pickett's opinions will be so technical and complex as to be inaccessible or confusing to a layperson. The proposed evidence does not require the witness to resort to arcane terms and language that would be unfamiliar and baffling to jurors. At the same time, the jury cannot be expected to have sufficient knowledge of various aspects of the opinion evidence such that it renders it unnecessary.

iii. Reliability

- [66] The party seeking to tender the expert evidence must demonstrate threshold reliability using tools appropriate to the nature of the opinion advanced by the expert. The objective is to ensure that in the courtroom, an expert employs the same level of intellectual rigor that characterizes the practice of an expert in their field: Abbey #1, at paras. 118-120.
- [67] Mr. Ali challenges the reliability of Dr. Pickett's evidence on the basis that the underlying patient data she relies on in part will not be disclosed due to patient confidentiality. Mr. Ali submits that this is problematic because it is then impossible to test the level of scientific rigor or identify a quantifiable rate of error for her conclusions. He says cross-examination of the underlying foundation of the opinion is impeded.
- [68] In this regard, it is important to note that the admissibility inquiry concerns threshold reliability. The Crown is required to demonstrate that there are sufficient indicia of reliability to warrant placing Dr. Pickett's opinion before the jury. Ultimate reliability is left to the jury to decide: Abbey #1, at para. 130.
- [69] Here, there are indicia of reliability to Dr. Pickett's evidence consistent with some of the factors listed in Abbey #1, including that:
- a) the field of emergency and forensic medicine within which the opinions are offered are recognized areas of professional expertise within the medical profession and subject to specialized training;
 - b) there is peer-reviewed literature supporting the opinions which Dr. Pickett references in her report;
 - c) Dr. Pickett's qualifications in the area of emergency and forensic medicine are significant;
 - d) Dr. Pickett can explain the reasoning process underlying her opinions (as she demonstrated in the voir dire) which is capable of being tested in cross-examination and critically assessed by the trier of fact; and
 - e) the proposed opinions are within the boundaries of Dr. Pickett's medical specialities.
- [70] I am satisfied that the proposed evidence is sufficiently reliable to warrant admission. The inability to pinpoint the level of scientific rigor of Dr. Pickett's methods or identify an error rate does not preclude its admission. In Mills, at para. 53, the court, referring to Abbey #1, explained that scientific validity is not a precondition to the admissibility of expert evidence, and that most expert evidence routinely heard in court cannot be scientifically validated, including the evidence of psychiatrists testifying about someone's mental state and doctors testifying about the causes of injury or death.

iv. Absence of Bias

[71] While anything short of clear evidence of an expert's unwillingness or inability to meet their duty to the court will satisfy the threshold criteria for impartiality, the trial judge must nevertheless take into account any concerns regarding the proposed expert's independence and impartiality at the gatekeeping stage by weighing those concerns in the balance: Mills, at para. 45. However, Mr. Ali has not demonstrated that there is any substance to his concerns that Dr. Pickett, by virtue of her professional practice and/or association with SAS, is unable or unwilling to carry out her primary duty to the court to provide fair, non-partisan, and objective assistance.

v. Other Considerations

[72] In some cases, expert witness testimony risks unduly prolonging a trial. There is no realistic prospect of such a risk in this case if counsel act reasonably. The Crown expects Dr. Pickett's testimony to consume more than two days of trial time within a trial scheduled for approximately three months. It is expected that Dr. Morin will testify before Dr. Pickett and explain many of the medical concepts and findings relevant to Dr. Pickett's evidence; thus, this will not need to be revisited at length with Dr. Pickett. When balanced against the benefit of the evidence to the jury, I am satisfied that the time consumed by Dr. Pickett's testimony will not unduly prolong the trial. The benefits of Dr. Pickett's opinion evidence to the trial significantly outweigh the risks of trial disruption or prejudice to the accused.

6. Conclusion

[73] For all the reasons given herein, I am satisfied that Dr. Pickett may testify as an expert in emergency medicine, forensic medicine, and sexual assault examinations, qualified to give opinion evidence in the case at bar in the areas sought by the Crown, as delineated in para. 2 of this ruling.

"Bernard J."

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