
CANADA / JUDGMENT

Sielsky v. Monaghan

2019 BCSC 974

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 974 Sielsky v. Monaghan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sielsky v. Monaghan,

2019 BCSC 974

Date: 20190617

Docket: M161812

Registry: Vancouver

Between:

Terrence Lee Sielsky

Plaintiff

And

Daniel Monaghan

Defendant

Before: The Honourable Madam Justice Ross

Ruling on Admissibility of Expert Report

Counsel for Plaintiff:

J.M. Cameron

K. Gourlay

P.J. Bosco

Counsel for Defendant:

L.C. Boulton

R.L. Moore

Place and Date of Hearing:

Vancouver, B.C.

April 23, 2019

Place and Date of Judgment:

Vancouver, B.C.

June 17, 2019

- [1] This is an action for personal injury arising from an incident that occurred on November 21, 2014. The plaintiff, Terrence Sielsky, is an RCMP officer. On that day he was on duty in an unmarked police car. He and a fellow officer, who was driving another unmarked police car, followed a Dodge truck, which they believed to be stolen, and which was driven by the defendant Daniel Monaghan. They followed the truck to a parkade near an apartment block in Surrey. The officer blocked the exit to the parkade in order to arrest the driver. In response, Mr. Monaghan rammed the two police vehicles two or more times in an effort to escape.
- [2] Corporal Sielsky alleges that he suffered injuries in the collisions including concussion or mild traumatic brain injury and psychological injuries. Mr. Monaghan's position is that Corporal Sielsky was not injured in the collisions.
- [3] The trial commenced with jury selection on April 1, 2019, and was set for 14 days. Mr. Monaghan applied at the start of the trial for leave to tender an expert report of an engineer, Bradley Heinrichs, which is dated and was served on March 28, 2019. Mr. Heinrichs' report relies in part on a Collision Reconstruction Investigative Report authored by Constable Tiwana dated November 21, 2014, that was produced to the defendant on March 21, 2019. The conclusions set out in Mr. Heinrichs' report are as follows:

7.0 CONCLUSIONS

Based on the assumptions, data, and methods detailed in this report:

- 1) The Ram backed up three times, likely contacting one or both of the Hyundai or Venza each time.
- 2) The time and distance travelled by the Ram limits Its impact speed to less than about 7 km/h In the first two Impacts. This would have resulted In about a 3 km/h or lesser speed change on the Venza.

- 3) The time and distance travelled by the Ram limits Its Impact speed to less than about 16 km/h In the final impact. This would have resulted In about a 7 km/h or lesser speed change on the Venza.
- 4) The Venza's electronic data recorder (EDR) only recorded one Impact, which suggests that either:
 - a) Battery damage disabled the system before it could record the final impact, or
 - b) Only one impact was severe enough to trigger the Venza's EDR.
- 5) The Impact recorded by the EDR is consistent with a speed change with a frontal component between about 1 and 5 km/h. This could be consistent with any of the impacts to the Venza, since they acted at an angle.
- [4] I granted leave to tender the report with reasons to follow. These are the reasons.
- [5] The plaintiff objects to the admission of the report on two grounds:
 - a) It will not assist the jury and therefore is not admissible under the criteria set out in R. v. Mohan, [1994] 2 S.C.R. 9; and
 - b) It was served far outside the timelines for expert reports as set out in Rule 11-6 of the BC Supreme Court Civil Rules, and its late service is prejudicial.
- [6] With respect to the Mohan criteria, the plaintiff submits that providing the jury with information about the speed change associated with an impact will be of no assistance to the jury in the absence of biomechanical evidence about what that may mean for the occupants of the vehicle, such as was presented in Wallman v. John Doe, 2014 BCSC 79. The plaintiff notes that in Wallman the defendants led evidence from several engineers regarding the likely speed change of the plaintiff's vehicle. This was then addressed in the evidence of the expert, Darrin Richards, who interpreted those speed changes utilizing his expertise in biomechanics to address the loading that results when a human body is subjected to acceleration forces.
- [7] There will be no such evidence in the present case. The plaintiff submits that speed change evidence standing alone is of no value to the jurors.
- [8] Counsel for the plaintiff cites Cameron v. Savory, 2008 BCSC 1633, in which the plaintiff applied to exclude a report from an engineer on the basis that it was neither relevant nor necessary. Counsel placed particular reliance on Justice Cole's observation at para. 10:

The defendant says that the change in speed is a factor that I can consider when determining the injuries suffered by the plaintiff. However, without medical evidence as to the effect of the change in speed, this information is not of assistance.

- [9] The plaintiff also cites *Homolka v. Harris*, 2002 BCCA 262, in which the issue on appeal was the admissibility of a report tendered by the defendant from an engineer dealing with the magnitude of the collision force and the likely movement of occupants in the plaintiff's vehicle. The court concluded that the trial judge had not given sufficient consideration to the Mohan criteria in admitting the report and ordered a new trial.
- [10] The plaintiff submits in conclusion that:
17. This case is not one involving a low velocity impact. It is a case where a large truck slammed into a vehicle three times with increasing severity each time. The damage to the plaintiff's vehicle makes this clear. An RCMP officer, fearing for his life, fired multiple shots into the side of the defendant's vehicle before the defendant finally stopped his efforts to escape.
 18. There is no legitimate issue that the forces involved in this accident were sufficient to cause injury.
 19. It is not necessary for the jury to hear evidence from an engineer about the speed change allegedly involved in one of three impacts. That will not assist the jury in reaching a conclusion in this case. Its potential to divert from the fact-finding process outweighs any need for the evidence.
- [11] The defendant notes that the plaintiff is characterizing the impacts, and intends to introduce photographs of the damage to the vehicle to support the assertion that this was not a low velocity impact.
- [12] With respect to Cameron I note that Justice Cole's fundamental concern with respect to the opinion was expressed in para. 11:

It is trite to say that the opinion expressed by an expert is only as good as the facts that have been proven. Here, there is no evidence as to the validity of the two-stage collision test conducted by MEA. There is no evidence as to the qualifications of the people that performed these tests, whether or not this experiment was published in a peer review article, or whether or not Mr. Bowler had anything to do with those experiments. It seems from the evidence that he did not, as he reviewed two video tapes of these staged collisions. Additionally, the defendant has not put into evidence the I.C.B.C. Low Velocity Impact claim forms or the repair estimate.

- [13] Thus there were fundamental concerns with the reliability of the data upon which the opinion rested. In addition, the fundamental facts upon which the opinion rested were not going to be proven at trial. No such concerns are expressed in relation to Mr. Heinrichs' report.
- [14] In my view, *Homolka* is also distinguishable. In that case the court was concerned in particular about an opinion concerning movement of the occupant in the vehicle. The court found the evidence to be of slight probative value in that the report was built upon unproven assumptions of dubious reliability. The expert had not disclosed specialized training as the source of his expertise in relation to the issue. The court also concluded that the opinion was

more akin to advocacy and was significantly prejudicial to the trial process. It was based upon common sense comparators that ran afoul of the requirement, pursuant to necessity, that an ordinary person could not reach the same conclusion.

- [15] Justice Saunders, for the court, concluded at paras. 16-19:
- [16] While the extent to which evidence in a civil case will be excluded on the basis of prejudice may not coincide always with the experience in criminal cases, an issue which is unresolved as Mr. Justice Wood pointed out in *Anderson v. Erickson* (1992), 71 B.C.L.R. (2d) 68 (C.A.), [1992] B.C.J. No. 1860, the basic rule remains that evidence which is not well founded in expertise, which does not speak to a matter beyond the ken of an ordinary juror, and which is, at best, of thin relevance, ought to be excluded.
- [17] In my view, the substance of the comments on occupant movement in the expert report which are in issue in this appeal bore these frailties.
- [18] In speaking to the motions of the occupant, who is not an inanimate object, the report is built upon an unproven assumption that an occupant will respond in the same fashion as an object in the vehicle cab, and to that extent may not be reliable. Further and more importantly, this author does not disclose the "specialized" source of his knowledge on which the comment is based, whether from education or research, in either the report or his testimony. Comparisons with dropping into a chair or being jostled in a crowd are made without reference to study or research and, from the author's testimony, appear not to be founded on specialized knowledge gained through education or study as one would expect from a professional engineer. Such comparisons are, in truth, more like advocacy of common sense which, if indeed common sense, does not require the imprimatur of expertise. In my view, the probative value of this evidence is slight. On the other hand, the prejudice to the trial process by insertion of what could be termed a pseudo-expert opinion and the danger that it may assume disproportionate importance is, in my view, considerable. In these circumstances, I do not consider that the trial judge gave sufficient consideration, in assessing the admissibility of this expert evidence, to the criteria of relevance as it was explained in *Mohan*.
- [19] This portion of the report also fails to meet the necessity criteria, in my view. The ruling admitting the evidence does not address this aspect of the issue. In my view, where, as here, comparisons used have no basis in science or special study or training but are instead common sense comparisons, they run afoul of the necessity criteria that an ordinary person could not draw the same conclusion. They may also stray into the realm of advocacy. Both faults are fatal to admission of that portion of the report.

[Emphasis in original.]

- [16] Again, no such concerns are advanced with respect to the report at issue in the present case.

- [17] The test for admissibility of expert opinion evidence was articulated by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, which adopted, with minor modification, the two-part test from *R. v. Abbey*, 2009 ONCA 624. The first stage of the test requires the court to be satisfied that the evidence meets the Mohan threshold conditions of relevance, necessity, a properly qualified expert, and that it does not run afoul of some other exclusionary rule. If the court is satisfied that these threshold conditions are met, the second stage of the test requires the court to conduct a cost-benefit analysis addressing whether the evidence is sufficiently beneficial to the trial process to warrant admission despite the potential harm to the process that may flow from admission.
- [18] This application was heard in advance of hearing any evidence at trial. This was necessary in order to give the plaintiff time to prepare a response to the report in the event the court rules that the evidence is admissible. It appears from the submission that the plaintiff will not be contending that the velocity of the impact is irrelevant. Rather, the plaintiff will be asserting that this was a high velocity impact and introducing evidence to persuade the jurors to reach that conclusion. Given that the plaintiff intends to characterize the velocity, thereby putting the matter in issue, it follows in my view that the proposed evidence meets the test of relevance.
- [19] With respect to the issue of speed change, this is clearly a technical matter out of the ordinary experience of laypersons. This is an area in which expert evidence would assist. There is no issue with the qualifications of the expert or with other exclusionary rules. Thus I conclude that the evidence satisfies the Mohan threshold conditions.
- [20] Turning to the second stage of the analysis, in my view the evidence will have probative value to the jury with respect to the inferences they will draw from the nature of the crash. I do not see this evidence as posing a threat to the jury's fact-finding process sufficient to warrant its exclusion for being unduly prejudicial. In my view the fact-finding process would face a potential distortion in a circumstance in which the plaintiff seeks to characterize the velocity of the impacts and the defendant is precluded from adducing evidence in response.
- [21] In the result I conclude that the evidence is admissible expert opinion.
- [22] With respect to the late service of the report, the plaintiff argues that while the report makes reference to the Event Data Recorder (EDR) data, it is primarily based upon video footage which was in the hands of the defendant long before the deadline for service. Thus the plaintiff characterizes the EDR data as a "red herring" and submits that if the majority of the report could have been produced in a timely fashion, there was no due diligence in its production.
- [23] Counsel for the plaintiff further submits that the admission of the evidence would be prejudicial given that it comes on the eve of trial, and that the evidence is of little or not probative value and therefore its admission is not in the interest of justice.

[24] The defendant submits that the EDR data is not a "red herring" but integral to the report. The defendant made all reasonable efforts to obtain the documents upon which the report is based only to have the Reconstruction Report produced by the RCMP on March 21, 2019. The defendant submits further that the plaintiff has not identified any particular prejudice other than inconvenience and has not asserted that he will be unable to address the evidence. Finally counsel submits that given the issues it is in the interest of justice for the evidence to be admitted.

[25] Rule 11-7(6) of the Supreme Court Civil Rules provides:

- (6) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this rule or Rules 11-1 to 11-6 have not been complied with, if
 - (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,
 - (b) the non-compliance is unlikely to cause prejudice
 - (i) by reason of an inability to prepare for cross-examination, or
 - (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or
 - (c) the interests of justice require it.

[26] With respect to the issue of due diligence, the affidavits filed by the parties set out a chain of actions taken by counsel for both of the parties to obtain the relevant documents from the RCMP file in a timely manner, commencing with the first request made on June 16, 2015. The chronology of efforts to obtain the documents is set out in the affidavits, and is as follows:

- a) On June 16, 2015, plaintiff's counsel wrote to both Langley and Surrey RCMP requesting all records.
- b) On July 8, 2015, Langley RCMP responded that they had no records because the incident was reported to the Surrey detachment.
- c) Plaintiff's counsel followed up with letters to the Surrey detachment on July 21, August 17, and September 15, 2015.
- d) On September 22, 2015, counsel received a response advising that because the matter involved RCMP members, they were to contact the Civil Litigation Analysis Unit.
- e) Counsel wrote to that unit on October 1, 2015, requesting the file, and then followed up on December 2, 2015, and January 4, 2016.

- f) On January 5, 2016, the RCMP confirmed receipt of the previous three letters but stated that they had not received the original request and could not process it. Counsel provided it by email that day.
- g) On January 5, 2016, the RCMP advised that the file had to be requested through access to information, a privacy request form, or court order.
- h) On January 13, 2016, Ms. Banh, a paralegal with the plaintiff counsel's firm spoke with a member of the RCMP E-Division who suggested that a request to the Information and Privacy Department was the best option.
- i) On January 14, 2016, counsel wrote to the department making a request for:
 - A copy of your comprehensive police report of the accident including the names and addresses of any witnesses to this accident;
 - Advise us if any photographs were taken of the scene, the damaged vehicles, etc. and if so, the number of photographs taken and their cost; and,
 - Copies of any measurements taken and/or copies of any diagrams made.
- j) Further information was requested from the plaintiff. It was provided by an email dated January 21, 2016.
- k) By letter of February 29, 2016, plaintiff's counsel received a 38-page file pursuant to the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165. It included a redacted version of the "General Occurrence" hardcopy. The cover letter advised that the police file was still under investigation and that they may be able to compel production of further information through a court order.
- l) On May 5, 2016, defence counsel advised plaintiff's counsel that they were starting to review the file and provided a draft consent order for production of the RCMP file, which was signed and returned and, by May 26, 2016, had been entered.
- m) The RCMP produced documents in response to defence counsel who provided the documents to plaintiff's counsel by letter of June 14, 2016.
- n) The examination for discovery of the plaintiff was conducted on August 2, 2018. Corporal Sielsky gave evidence that the incident was investigated by Langley RCMP. Counsel requested production of the internal investigation reports and followed up with a letter to plaintiff's counsel dated September 27, 2018.
- o) By letter dated August 8, 2018 defence counsel wrote to plaintiff's counsel seeking all records from the RCMP internal investigation. Counsel responded, inviting the defence to make a Freedom of Information (FOI) request or to proceed by way of consent order.
- p) There were further exchanges between counsel by letters dated September 27, 2018, and October 18, 2018.

- q) On October 23, 2018, Ms. Hunt, a paralegal with the defendant's firm, telephoned the disclosure unit at the Surrey RCMP to determine what further files were linked in order to prepare an FOI request. She deposes that she was advised by the disclosure unit that multiple searches had been done to determine if any other files were linked with or related to the Surrey file and they confirmed that none existed.
 - r) Defence counsel then retained an investigator in an effort to obtain additional information from the RCMP which was believed to exist but which had not been produced.
 - s) The investigator advised counsel on March 19, 2019, that Staff Sergeant Major Hurst had provided the name of Corporal Michelle Stewart, who was the officer in charge of the Langley investigation.
 - t) Corporal Stewart was served with a subpoena to attend the trial on March 20, 2019. That day Corporal Stewart provided the investigator with the Investigative Review Report and statement of Corporal Sielsky and Constable Kotsalis, the other officer who was involved in the incident. She then provided the Collision Reconstruction Investigation Report on March 21, 2019.
- [27] In my view counsel for both parties exercised due diligence, yet the end result was that the Reconstruction report was only produced on March 21, 2019. I do not agree with the plaintiff's contention that the EDR information is a red herring. I am satisfied that the requirements for due diligence have been met.
- [28] With respect to prejudice, there is no doubt that the admission of this evidence would cause inconvenience to the plaintiff and serve as a source of distraction. However there is no suggestion that the plaintiff cannot prepare for cross examination or otherwise respond to this evidence if it is admitted.
- [29] Given my analysis pursuant to the test set out in *Abbey*, I am satisfied that it is in the interest of justice for the court to exercise its discretion to admit the evidence.

"Ross J."

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