
CANADA / JUDGMENT

Somers v. MacLellan

2022 BCSC 2304

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2304 Somers v. MacLellan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Somers v. MacLellan,

2022 BCSC 2304

Date: 20221021

Docket: M196934

Registry: Vancouver

Between:

Cody Eugene Somers

Plaintiff

And

Richard MacLellan and Marilyn MacLellan

Defendants

Before: The Honourable Madam Justice Tucker

Oral Ruling on Voir Dire #1

re: Admissibility of Moss Reports

Counsel for the Plaintiff:

A.C.R. Parsons

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Counsel for the Defendants:

J.D. McAfee

L. von Bloedau

Place and Date of Trial:

Vancouver, B.C.

October 3-7, 11-14, 17, 20 and
24-28, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 21, 2022

[1] THE COURT: This is my oral ruling on voir dire #1 dealing with the admissibility of the Moss Reports.

I. Background

- [2] This is a personal injury claim arising out of a March 2019 single-vehicle accident on a road outside Fort St. John. The truck slid sideways at a considerable speed, entered a ditch adjacent to the road and rolled over. It ultimately landed right-side up in the ditch, facing the direction it had been coming from prior to the accident.
- [3] The plaintiff was ejected from the vehicle during the accident and came to rest in the ditch, ahead of the front end of the truck. The defendant was able to, and did, get out of the truck on his own following the accident. Thus, no one remained inside the truck by the time third parties arrived at the accident scene.
- [4] The central factual dispute is the identity of the driver at the time of the accident. Each party points to the other as the driver.
- [5] Ms. Moss is the defendants' proposed accident reconstruction and biomechanical engineering expert. She is employed by CEP Forensic ("CEP"). Her first report, dated July 8, 2022, offers an opinion as to how the vehicle moved during the accident, where in the vehicle the parties were before and during the accident, and how the plaintiff came to be ejected from the vehicle. Her second report, dated August 19, 2022, responds to the plaintiff's expert evidence on those same points. I will refer to two reports collectively, as the "Moss Reports".
- [6] The plaintiff objects to the admissibility of the Moss Reports. The plaintiff's admissibility objections are to the Moss Reports in their entirety. Redactions were not sought.

- [7] I note that as Ms. Moss was an out-of-town expert, the parties agreed that Ms. Moss would provide her full testimony during the voir dire, making it unnecessary for her to reattend in the event the reports were admitted.
- [8] The plaintiff objects that:
- a) The Moss Reports do not comply with the requirements of the Supreme Court Civil Rules [Rules], R. 11-6.
 - b) Ms. Moss engages in a fact-finding exercise that usurps the role of the judge as the trier of fact and does with respect to the ultimate issue of who was driving.
 - c) Ms. Moss relies on inadmissible evidence, including statements that Ms. Moss herself selected from the plaintiff and Mr. MacLellan's examination for discovery transcripts, and on the hearsay statements of RCMP police officers.
 - d) Ms. Moss has failed to provide an engineering analysis at all, and instead provides her own interpretation of facts and circumstances that the court does not need expert assistance to consider. The plaintiff says that since the Moss Reports do not apply expertise, they amount to argument and advocacy.
 - e) The plaintiff relies on the fact that CEP and the defendants' insurer, Aviva, are party to a service provider agreement and have an ongoing client-service relationship. He argues that what he describes as the biased content in the Moss Reports should be viewed through the lens of this service relationship.
 - f) Finally, the plaintiff asserts that Ms. Moss is biased. He says this is evident from the unreliability of her opinion as disclosed during cross-examination. The primary points relied upon here are that: (1) Ms. Moss made a significant inaccurate assertion of fact in the first Moss Report (which I note was conceded at the outset of her direct testimony); and, (2) her testimony that the reason she did not comment on certain marks inside the vehicle was because she could not conclude whether they were the result of an occupant or flying debris.

II. Legal Framework

- [9] There is no dispute between the parties as to the proper legal framework. It is as set out in *Uy v. Dhillon*, 2019 BCSC 2435 at paras. 2-7:
- [2] Generally speaking, expert evidence is an exception to the rule against opinion evidence. The role of an expert is to assist the trier of fact and to be independent and not an advocate.
- [3] *R. v. Mohan*, [1994] 2 S.C.R. 9, set out the criteria for determining threshold admissibility of expert opinion evidence at para. 17. The analysis is divided into two stages.
- [4] First the evidence must meet the four Mohan factors:

- a) relevance;
 - b) necessity;
 - c) absence of an exclusionary rule; and
 - d) qualification in an area of special expertise.
- [5] Second, as part of our gatekeeping role, the trial judge must weigh potential risks against the benefits of admitting the evidence in determining whether the potential probative value of the expert evidence is sufficiently beneficial to the trial process to warrant its admission despite any potential harm that may result, including consumption of time, unnecessary litigation costs and prejudice, confusion, or the risk that the trier of fact will abdicate its finding role to the expert: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.
- [6] The Mohan criteria apply equally to both jury trials and judge-alone trials: *Level One Construction v. Burnham*, 2017 BCSC 2470 at para. 23. Expert opinion evidence either satisfies the Mohan admissibility criteria or it does not: *Keefer Laundry v. Pellerin Milnor Corporation*, 2007 BCSC 899.
- [7] In addition, Rule 11(6) sets out a series of requirements for the admissibility of expert reports which include the requirement of "a description of the factual assumptions on which the opinion is based."
- [10] Reliance is also placed on the following principles set out in *Waterway Houseboats Ltd. v. British Columbia*, 2018 BCSC 2514 at paras. 10-12:
- [10] They correctly point out that expert evidence is, as a matter of law, presumptively inadmissible and that the burden of proof is on the plaintiffs to satisfy the following well-known criteria before expert reports will be admitted:
- a) The expert must be properly qualified;
 - b) The expert report must be relevant to the issues before the court;
 - c) The expert report must be necessary to assist the trier of fact;
 - d) The expert report must be reliable; and
 - e) Its probative value must exceed any prejudicial effect it may have.
- [11] The defendants rely on various well-known passages in *R. v. Mohan*, [1994] 2 SCR 9 at paras. 17-28; *Regina v. Abbey*, 2009 ONCA 624 at para. 76; *Dhaliwal v. Bassi*, 2007 BCSC 549 at para. 9; *R. v. D.D.*, 2000 SCC 43 at para. 36; *Beazley vs. Suzuki Motor Corporation*, 2010 BCSC 646, at para. 14; among others in support.
- [12] Other well-known principles they rely on are that:

- a) An expert cannot make his or her own findings of facts and then base an opinion on those findings: *Neudorf v. Netzwerk Productions Ltd.*, 1998 BCJ No. 2690, at paras. 14-15 [Neudorf];
- b) Inferences to be drawn from proven facts are for the court to determine, not the expert. Expert evidence that usurps the role of the trier of fact is inadmissible: *Emil Anderson Construction Co. v. British Columbia Railway Co.* [1987] 15 BCLR (2nd) 28 at p. 4; *Murray v. Galuska*, 2002 BCSC 1532 at paras. 15 and 16; and *Neudorf* at para. 4;
- c) General opinion evidence that invites speculation rather than explains specific evidence is inadmissible: *R. v. Lee*, 2003 BCSC 2050, at paras. 29-34; and
- d) The ultimate issue is to be decided by the trier of fact, not the expert. The closer the testimony gets to determining the ultimate issue the court is to decide, the more inclined the court is to reject its admissibility: *Sopinka*, *The Law of Evidence in Canada*, 1992, at page 540.

[11] I agree with these statements on the law and adopt them as the framework for this decision.

III. Rule 11-6(1) Requirements

[12] The plaintiff objects to the Moss Reports as non-compliant with R. 11-6(1)(c), (d) and (f)(i).

[13] Rule 11-6(1) reads:

Requirements for report

- (1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:
 - (a) the expert's name, address and area of expertise;
 - (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
 - (c) the instructions provided to the expert in relation to the proceeding;
 - (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
 - (e) the expert's opinion respecting those issues;
 - (f) the expert's reasons for his or her opinion, including
 - (i) a description of the factual assumptions on which the opinion is based,
 - (ii) a description of any research conducted by the expert that led him or her to form the opinion, and
 - (iii) a list of every document, if any, relied on by the expert in forming the opinion.

- [14] Rule 11-6(1)(c) requires the instructions to an expert to be provided. Commonly, this is done by attaching counsel's instruction letter to the report, although instructions are sometimes restated in relevant detail in the body of the report itself. The Moss Reports do neither of these things.
- [15] Counsel's instruction letter was only disclosed to the plaintiff pursuant to his disclosure request under R. 11-6(8) of the Rules. The plaintiff correctly asserts that R. 11-6(1)(c) has been breached. However, as disclosure of the instruction letter was made under R. 11-6(8) well prior to the trial, I am unable to identify any particular prejudice arising here. I conclude that the breach is not disqualifying and can be cured under R. 11-7(6)(b).
- [16] An expert report is also required to set out the nature of the opinions sought and the issues to which it relates. The Moss Reports do not address this requirement directly. However, given Ms. Moss's specific expertise and area of practice, there is an obvious correspondence between counsel's request for a collision reconstruction assessment and report and identification of the driver as the central disputed issue, and the matters Ms. Moss addresses in the "summary of conclusions" section found at the outset of her report. I am satisfied that the technical requirement is met in substance.
- [17] An expert report must also set out the factual assumptions on which it is based. While expert reports commonly contain a section entitled something along the lines of "Facts and Assumptions", the Moss Reports do not. Ms. Moss has, instead, set out a section entitled "Data Collection".
- [18] In my view, the facts and assumptions relied upon are adequately set out in the Data Collection section, with the sources for that information also being identified. That information is set out in a manner that readily enables the reader to assess whether the various facts and assumptions set out were established or disproven by evidence at trial. Thus, I am satisfied that the Data Collection section fulfils the R. 11-6(1)(f)(i) requirement.

IV. The Admissibility Analysis

- [19] As outlined in *Uy and Waterway*, the analysis has two stages. At the first stage, the court must be satisfied that the proffered expert evidence meets the Mohan preconditions: (a) relevance; (b) necessity; (c) absence of any exclusionary rule; and (d) qualification (i.e., the witness must have an area of special expertise and be willing and able to discharge their duty to the court).
- [20] At the second stage, the court must weigh the potential risks against the benefits of admitting the evidence by considering whether the evidence has potential probative value; is sufficiently beneficial to the trial process to be admitted despite its potential harms, including the consumption of time, litigation cost, prejudice, and confusion; and the risk that the trier of fact may abdicate the fact-finding role to the expert: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess].

- [21] Of the Mohan factors, relevance, exclusionary rules, and special expertise are not in dispute. On necessity, the plaintiff asserts that although Ms. Moss does have special expertise, the Moss Reports fail to apply it, citing *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109 at para. 12. He also submits that the inferences drawn by Ms. Moss are ones the court is capable of drawing without expert assistance: *Maras* at para. 12; *Neudorf v. Netzwerk Productions Ltd.*, [1998] B.C.J. No. 2690 (S.C.) at paras. 2 and 3.
- [22] He also submits that given Ms. Moss's expertise is not brought to bear, her opinions are simply argument in the guise of expert reports: *Neudorf* at para. 7.
- [23] I do not agree with the plaintiff's assertion that Ms. Moss did not apply her specialized knowledge and engineering principles to reach her conclusions. It includes, for example, discussion of far-side versus near-side forces on vehicle occupants during a rollover, the probability of certain injuries being or not being sustained based on different seating and seat belt scenarios, and criticism of the analytical feasibility of reaching conclusions with the degree of precision of those set out in the plaintiff's expert reports.
- [24] While Ms. Moss did not approach her opinion in the same analytical fashion as was adopted by the plaintiff's experts, her position is that the plaintiff's expert's report is not suitable to the circumstances.
- [25] Nor am I persuaded that Ms. Moss has misunderstood her task and attempted to usurp my role as the trier of fact. Although she sets out statements from the parties' examinations for discovery and health records in her Data Collection section, the statements she selects fulfil the role of assumed facts. For example, the parties' statements as to whether they had seat belts on, how the defendant said he got out of the vehicle, where the plaintiff was found on the ground, and the injuries each party reported after the accident.
- [26] She does not attempt to make any determinations of credibility, but rather treats those matters as factual assumptions. She also identifies certain assumed facts as being based on statements made by RCMP members.
- [27] Having reviewed the discovery evidence is not disqualifying, provided the expert sufficiently identifies the factual assumptions the opinion rests upon: *Friebel v. Omelchenko*, 2013 BCSC 948 at paras. 18-19. An expert is also entitled to rely on hearsay provided the hearsay is set out in the report in a way that allows the court to ascertain whether that hearsay has been proven by admissible evidence or otherwise established as reliable: *Mazur v. Lucas*, 2010 BCCA 473 at para. 40.
- [28] The assumptions that Ms. Moss has taken from the discoveries, hospital records, the RCMP records and statements, along with all of her other factual assumptions, may or may not be borne out on my findings of fact. My findings of fact will be made taking into consideration all of the evidence before me. The Moss Reports will then fall to be evaluated in light of my findings.

- [29] Ms. Moss does express her opinion of what was more or less likely to have occurred, but only based on the limited factual assumptions before her. While she uses the phrase "balance of probabilities" to express "more likely than not", I do not consider her use of that phrase to be an indication that she misconceived her expert role.
- [30] Similarly, while the term "investigation" is used in the report, CEP initially had a limited retainer to examine the truck and provide comments on seat belt use and seat positions. That retainer was subsequently overtaken by a request to provide an accident reconstruction report. The use of the term "investigation" appears to reflect the initial retainer and the fact that a CEP employee did go out into the field to photograph and take measurements from the impounded truck, and that collection of work is reflected in the Data Collection section itself.
- [31] With regard to the requirement for an expert to be impartial and independent, it was established on cross-examination that CEP is an approved service provider for Aviva and performs its project work for Aviva pursuant to a general service agreement. Ms. Moss, who is a member of the CEP's engineering department, testified that her knowledge of the terms of the Aviva service agreement are limited to those shown on the information card associated with the file opening and which sets out information like the charge rate, client reporting requirements, and invoice guidelines.
- [32] The defendants' R. 16-1(8) disclosure, and the first Moss Report on its face, disclose that CEP's initial contact in the matter was directly with Aviva. If the plaintiff wished to seek further disclosure regarding the details of CEP's relationship with Aviva prior to trial, a request to counsel or an application to court for additional disclosure could have been made. All that is before me is Ms. Moss's testimony as outlined above. Nothing in that testimony suggests that there is anything out of the ordinary in the CEP/Aviva relationship.
- [33] I note that many law firms engage the same expert or the same association of experts on a repeat basis. There can be little doubt that professional experts are hopeful of repeat engagements or, at the least, of favourable client reviews that will help them obtain other engagements. However, there is no basis for assuming that such desire provides a motivation to be partial in terms of an outcome, as opposed to motivation to provide a quality product. An expert's hope of a continuing service relationship with the party or firm that engaged them does not, in and of itself, give rise to "a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply" with their duty to the court: White Burgess at para. 48.
- [34] I am satisfied that Ms. Moss is capable of acting as an impartial witness, notwithstanding CEP's client relationship with Aviva.

[35] Moving onto the second stage, the Moss Reports and their significance to this litigation is comparable to the accident construction reports considered and admitted into evidence by Justice Boyd in *Dawes v. Jajcaj* (1995), 15 B.C.L.R. (3d) 240 (S.C.), 1995 CanLII 2726 at paras. 24-29. I note the latter part of para. 25 from that decision in particular:

25 . . . The identification of the driver of this vehicle is not a mere "commonplace problem". Rather, the dynamics of the movement of the vehicle, its impact with the utility pole at the side of the road and the number of post-impact revolutions, all combined with the position of the occupants post-impact and the particular damage to the vehicle components, are crucial in a reconstruction of this accident and from this, the identification of the driver. In this regard, the input of the engineering experts is helpful if not crucial to the court's fact-finding role.

[36] I am satisfied here that the four Mohan preconditions are all met and I am satisfied that the broader gatekeeping analysis strongly favours admission of the Moss Reports.

[37] The plaintiff has raised many points about the accuracy and reliability of parts of the Moss Reports. I do not intend to canvass these, as the plaintiff has made it clear that they would be raised again with regard to the weight of the report if it was admitted.

V. Disposition

[38] My ruling is that the Moss Reports will be admitted in evidence as part of the defence case. My understanding is that the parties are agreed that in the event the Moss Reports were admitted, that the voir dire evidence would be rolled into the trial proper. I will just request that the parties confirm that for the record at this time, and then I would suggest that we can leave the matter of the entry of the voir dire exhibits to be addressed on Monday morning when the parties are all in the courtroom.

[39] CNSL R. PARSONS: Yes, Justice.

[40] CNSL J. MCAFEE: Agreed, Justice.

[41] THE COURT: All right.

"Tucker J."

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