

CANADA / JUDGMENT

Sovani v. Jin et al

2005 BCSC 1853

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1853err1 Sovani v. Jin et al

Citation:

Sovani v. Jin et al

Date:

20050120

2005 BCSC 1853

Docket:

B981465

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

Madam Justice Neilson and Jury

February 7, 2005

BETWEEN:

SHAFFIN SOVANI

PLAINTIFF

AND:

XIAO MING JIN and CHI LAN YANG

DEFENDANTS

Docket:

S056078

Registry: New Westminster

BETWEEN:

SHAFFIN AMIRALI SOVANI

PLAINTIFF

AND:

MARIUSZ J. KWIATKOWSKI

DEFENDANT

Docket:

S057344

Registry: New Westminster

BETWEEN:

SHAFFIN SOVANI

PLAINTIFF

AND:

COLLEEN ANNE CRAIG and JOSHANA C. CRAIG

DEFENDANTS

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Counsel for the Defendants, Jin, Yang and Craig

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Counsel for the Defendant, Kwiatkowski

L. Stevens

- [1] THE COURT: The plaintiff opposes admission of a report from Dr. Iverson, a neuropsychologist retained by the defence, which analyzes the results of the MMPI-2, a psychometric test administered by Dr. Krywaniuk, a neuropsychologist retained by the plaintiff.

- [2] First, the plaintiff argues that Dr. Iverson's opinion is relevant solely to the central issue of the plaintiff's credibility, which is for the jury to determine. Second, he says that the evidence led from neuropsychologists thus far is clear that psychological tests cannot be viewed in isolation. They must be interpreted in the context of other information from the patient and collateral sources familiar with him. Dr. Iverson has never seen the plaintiff nor is his opinion based on collateral information.
- [3] Dr. Iverson describes himself as a "leading researcher in North America in the area of exaggeration and malingering in neuropsychology." He says his report is a commentary on reliability and validity of the results of the MMPI-2 administered to the plaintiff.
- [4] Dr. Iverson states his views in reply to Dr. Krywaniuk's report. However, that report was not placed in evidence. Instead, Dr. Krywaniuk gave oral evidence of his opinions and there were some significant distinctions between his report as quoted in Dr. Iverson's report, and Dr. Krywaniuk's evidence before the jury.
- [5] During cross-examination Dr. Krywaniuk did, however, adopt the part of his report which is the focus of Dr. Iverson's attack, which I quote from page 10 of Dr. Iverson's report as follows:

Personality, function and psychological adjustment were explored using the Minnesota Multiphasic Personality Inventory 2. The validity profile shows a significant elevation on the F-scale indicating that he is reporting a high degree of emotional and personal problems, possibly as a 'cry for help.' It is possible that he is over-reporting his problems or that he is extremely highly focussed on them.

Consequently, the remainder of the results will need to be viewed cautiously.

- [6] Dr. Iverson is critical of Dr. Krywaniuk because he relied solely on the F-scale from the MMPI-2 in reaching that conclusion. Dr. Iverson indicates he has conducted a more careful and thorough interpretation of the MMPI-2 which revealed "much more compelling evidence of exaggeration."
- [7] His 11-page report includes a compendious and complex recitation of many reports from the scientific literature on tests for malingering and exaggeration that researchers have derived from material obtained by the administration of MMPI-2 on various populations. It sets out his analysis of the plaintiff's scores on each of these measures and concludes at page 10:

There is evidence that Mr. Sovani exaggerated his psychiatric problems, health problems, and level of disability on this test. Therefore the clinical interpretation of the various scales and subscales is fundamentally confounded by this level of exaggeration.

- [8] At page 11 he goes on to say:

After a careful review of Mr. Sovani's MMPI-2 profile, it would be reasonable to conclude that there is considerable evidence of distortion and exaggeration of his psychiatric problems, physical problems, and level of disability. An alternative explanation would be that he was severely mentally ill at the time of this evaluation and he was in need of urgent psychiatric hospitalization. This seems very unlikely, however, or Dr. Krywaniuk would have recognized this. Dr. Krywaniuk speculated that the underlying cause or motive for Mr. Sovani's exaggeration was "a cry for help" or that he was "extremely highly focused" on his problems. An alternative explanation, of course, is that he frankly exaggerated his problems to influence the outcome of this independent evaluation and his personal injury litigation. Regardless of the underlying motive for the exaggeration, the presence of major exaggeration makes it impossible to determine the true nature and extent of his psychiatric problems, physical problems, and level of disability during this evaluation.

- [9] In *Lawson v. McGill*, 2004 BCCA 68, the Court of Appeal considered the propriety of admitting somewhat similar evidence from a Dr. Hayes, a psychologist retained by the defence, who had seen the plaintiff and administered a number of psychometric tests to her including the MMPI-2. Dr. Hayes concluded that there were indications the plaintiff was exaggerating her symptoms.
- [10] Thackray J.A., speaking for the court at paragraphs 48 and 49, found that Dr. Hayes' report would not be admissible in its own right, as standing alone it was relevant only to the issue of credibility. He reiterated the view of the Supreme Court of Canada in *R. v. Marquard*, [1993] 4 S.C.R. 223, that "expert evidence on the ultimate credibility of the witness is not admissible." Mr. Justice Thackray went on to consider whether it was nevertheless relevant as reply evidence to the plaintiff's expert and admissible on that basis, noting again from *Marquard* that "expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact."
- [11] The plaintiff's expert there had expressed the view that the plaintiff was not feigning or malingering, based on the validity of their test results. Justice Thackray found that the only means of replying to that evidence was to permit Dr. Hayes to testify to the different conclusions she had reached on her tests. Dr. Hayes testified that she was not commenting directly on the plaintiff's credibility, she was simply saying the psychometric test results obtained by both her and the plaintiff's expert were invalid and could not be relied upon.
- [12] Based on the principles considered in *Lawson*, I conclude that Dr. Iverson's report would not be admissible in isolation because it deals solely with the plaintiff's credibility.

- [13] The defence argues, however, that it is admissible as it is necessary to reply to the evidence of Dr. Krywaniuk and Dr. Sbordone, another neuropsychologist who testified for the plaintiff. The defence says symptom magnification by the plaintiff is a major issue, the neuropsychological evidence is consistent in acknowledging that psychometric testing can be manipulated, and scales have been developed from the MMPI-2 to detect over reporting. They say it is important to establish that the MMPI results are invalid due to exaggeration.
- [14] The defendants argue that Dr. Krywaniuk showed bias in selectively interpreting only the F-scale of the MMPI results, and not considering the measures put forward by Dr. Iverson as well in reaching his conclusions.
- [15] I have reread the evidence of Dr. Sbordone and Dr. Krywaniuk about the MMPI-2, to determine whether Dr. Iverson's report is relevant in replying to them. Dr. Sbordone said little about the MMPI-2. He did not administer it or rely on it in reaching his conclusions of the plaintiff. On cross-examination he agreed that it is not appropriate to simply administer neuropsychological tests and draw conclusions from the results. The clinician should also see the patient and obtain collateral information. He agreed that some scales on the MMPI-2 are possibly relevant to detecting malingering and psychiatric disorders, like PTSD, but said you must look at the big picture. On cross-examination he expressed doubt about the reliability and some of the measures and studies on which Dr. Iverson relies.
- [16] I find that Dr. Sbordone did not use the MMPI in his assessment of the plaintiff. The fact the defence put some of Dr. Iverson's concepts to him in the cross-examination is insufficient to make Dr. Iverson's report relevant as reply evidence to Dr. Sbordone's testimony.
- [17] If Dr. Iverson's report is admissible, it must be in reply to Dr. Krywaniuk. Dr. Krywaniuk testified in chief that he administered the MMPI-2, but said he does not use it on a stand-alone basis. He said it raises hypotheses as possibilities, and these must be validated by information from the client and collateral sources. He said the F-scale derived from the MMPI picks up distress. A number of things can push it up, including healthcare professionals not believing complaints.
- [18] He was asked to explain the fake bad scale, which is one of the measures discussed by Dr. Iverson in his report. Dr. Krywaniuk said it was developed to try and identify people who are faking. It is the subject of ongoing research, but the studies encounter difficulties in methodology. It is his view that the fake bad scale is prone to misclassifying subjects as malingerers.
- [19] It was not until cross-examination that Dr. Krywaniuk was asked how he uses the MMPI-2. He said he uses it to explore personality function and psychological aspects of the client. That part of his report which I quoted at the outset of these reasons was put to him, and he adopted it and again endorsed cautious interpretation of the MMPI results here, due to three possible factors, one of which he acknowledges is over-reporting. He went on to acknowledge that elevation of the F-scale suggests a number of possibilities, one of which is distortion or exaggeration for secondary gain. Another is a cry for help.

- [20] Dr. Krywaniuk agreed he narrowed down the F-scale result as indicating one of the three factors set out in the quoted part of his report, but he acknowledged that he did not say which it was. He said he did not conclude it was a cry for help, and that he had not ruled out exaggeration. He just recognized that the high F-scale indicated that the test had to be cautiously interpreted, as it might not portray an accurate picture of the plaintiff. He did say that, if he took the result at face value and the result had been valid, the profile as a whole was a general distress profile, similar to the profile seen with chronic health or injury or other long-standing concerns. It also showed an elevation based on psychological factors perhaps associated with PTSD symptoms or general distress symptoms.
- [21] Dr. Krywaniuk agreed, however, that the plaintiff's response to the MMPI may not have been valid. He said he would have reached the same conclusions about the plaintiff independent of the MMPI results. He did not feel he had been unduly influenced by that test.
- [22] He was asked about a number of the scales Dr. Iverson raises in his report, and agreed he had not considered these. He also agreed that several of the plaintiff's results on those scales could be viewed as "red flags", and they could show possible exaggeration and malingering. He said, however, that he did not consider them due to the question of how representative the MMPI results were. He reiterated that the shape of the overall profile was distress, and agreed that malingering was a possible interpretation but said he did not feel this was the case for the plaintiff.
- [23] I find the circumstances here distinct from those in *Lawson v. McGill*. Dr. Krywaniuk is not relying on the MMPI-2 as central to his opinion. He is not saying that, based on its results, he has concluded that the plaintiff is not exaggerating. He acknowledges the MMPI-2 testing here is of questionable validity. He acknowledges that over-reporting by the plaintiff is one possible cause of that. He does not rule out that one possible interpretation is exaggeration and malingering, although he does not subscribe to that himself based on his overall assessment of the plaintiff. While he offers an interpretation of the MMPI-2 taking the results at face value, he concludes that he would have reached the same opinion about the plaintiff without the MMPI-2 results.
- [24] Dr. Iverson's report is all about exaggeration and malingering. That is his field of expertise, and the report includes a 6-page review of complex and technical neuropsychological literature dealing with research in these fields.
- [25] At page 10 he sets out repeated conclusions that the plaintiff might be exaggerating. At page 11 he sets out the final views which I have quoted above, and which include the gratuitous comment that the plaintiff "frankly exaggerated his problems to influence the outcome of this independent evaluation and his personal injury litigation." Such a statement could clearly influence the jury in assessing the plaintiff's credibility, yet Dr. Iverson gives no factual foundation for that comment. Nor does he set out any clinical or collateral data that supports that or his other opinions. He has not seen the plaintiff, and did not administer the test to him. He is simply taking the printout of the plaintiff's results on the MMPI-2 and

comparing his scores on the various scales to the information in these studies.

- [26] I infer that the validity of his analysis is entirely dependent on the validity of those studies. While the defence argues that his report goes to the validity of the MMPI results, I find that this final conclusion on the validity of the test is almost lost in the analysis that focuses on exaggeration and malingering by the plaintiff. Moreover, the plaintiff's experts, as I have indicated, did not rely on the MMPI-2 as a foundation for their opinions, or for finding that the plaintiff's complaints were genuine. Given the minimal weight placed on the MMPI-2 by the plaintiff's experts, I do not view Dr. Iverson's report as relevant reply evidence.
- [27] In considering the overall picture in the context of the cost-benefit analysis espoused in *R. v. Mohan*, [1994] 2 S.C.R. 9, I have serious concerns that the admission of Dr. Iverson's report would lead the jury to conclude that scientific literature on the MMPI-2 conclusively demonstrates that the plaintiff is exaggerating his claim, and that this report would distort their own consideration of the plaintiff's evidence and credibility, as well as their consideration of the evidence from other witnesses that is central to the question of whether the plaintiff's complaints are genuine.
- [28] The defence is correct that symptom magnification is an important issue here. I conclude that the jury should not be diverted from forming their own views on that issue by a complex scientific report relying on scientific research. Using the *Mohan* criteria, it is my conclusion that the Dr. Iverson's report is not relevant nor is it necessary. It will not be admitted.

"K. Neilson, J."

The Honourable Madam Justice K. Neilson

July 25, 2005 - Revised Judgment

Corrigendum to the Oral Reasons for Judgment issued advising that the Oral Reasons for Judgment dated January 20, 2005, wherein the plaintiff opposed the admission of a report from Dr. Iverson should be dated February 7, 2005 and not January 20, 2005.

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