

CANADA / JUDGMENT

Whaley v. Bryant

2020 BCSC 531

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Supreme Court of British Columbia

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2020 BCSC 531 Whaley v. Bryant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Whaley v. Bryant,

2020 BCSC 531

Date: 20200304

Docket: M47007

Registry: Kamloops

Between:

Tegan Darlene Whaley

Plaintiff

And

Leslie Bryant

Defendant

- and -

Docket: M47008

Registry: Kamloops

Between:

Tegan Darlene Whaley

Plaintiff

And

Michael Burke and Margaret Ann Kendrick

Defendants

Before: The Honourable Madam Justice S. Donegan

in Chambers

Oral Ruling on Voir Dire #5

Admissibility of Dr. Laidlow's Report

Counsel for the Plaintiffs appearing by teleconference:

K. Priddle

J. Kooner

Counsel for the Defendant:

G. Ginter

A. Reynolds

Place and Date of Hearing:

Kamloops, B.C.

December 10, 2019

Place and Date of Judgment:

Kamloops, B.C.

March 4, 2020

Introduction

- [1] Paige Whaley, now known as Paige Airavelle, suffered injuries in accidents in 2009 and 2010, when she was a child. At her recent jury trial, she alleged that she suffered a variety of injuries including primarily mechanical spine pain in the neck, upper and lower back as a result of the accidents, and she sought damages for her pain and suffering, past income loss, loss of future earning capacity, and cost of future care.
- [2] In addition to her testimony and that of some of her family members, Ms. Airavelle relied upon the expert opinion evidence of Dr. Shearer, a medical doctor practicing sports and exercise medicine who was qualified to give opinion evidence in the assessment, diagnosis, and treatment of musculoskeletal injuries. She also relied upon the evidence of Sabrina White, an occupational therapist who was qualified to give opinion evidence on the assessment of physical abilities and limitations and treatment of musculoskeletal function

in employment, home-making, and leisure activities.

- [3] The defendants admitted liability in both actions and proposed to tender only one expert report in their case, indeed only one witness in their case, Dr. Laidlow. Dr. Laidlow is a medical doctor with a specialty in physical medicine and rehabilitation, qualified to give expert opinion evidence on the diagnosis, causation, prognosis, and treatment of musculoskeletal injuries.
- [4] Ms. Airavelle objected to the admissibility of Dr. Laidlow's report entirely or, in the alternative, sought redactions to certain portions of it. Her primary complaint related to bias, but issues pertaining to necessity and other exclusionary rules were raised as well. While the jury was waiting, a voir dire was held, extensive written and oral submissions were made, and I rendered a decision. I concluded the report was admissible, but that certain redactions were required and indicated that my reasons would follow. These are those reasons.

Legal Principles

- [5] Ordinarily, witnesses testify as to facts and are not allowed to give opinions about those facts. That is because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inferences from the evidence and to form her or his own opinions on the issues in the case: *R. v. K.A.* (1999), 137 C.C.C. (3d) 225 (Ont. C.A.) at paras. 71-72.
- [6] There are many well-known reasons for the general exclusion of opinion evidence. These include concerns about usurping the role of the trier of fact, necessity, reliability, bias, confusion, delay, and cost.
- [7] The modern legal framework for the admissibility of expert opinion evidence was set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess]. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: *White Burgess* at paras. 17-18. The trial judge acts as a gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.
- [8] The expert evidence analysis is divided into two stages.
- [9] First, the proffering party must demonstrate the existence of certain pre-conditions (the "Threshold Requirements"):
1. The evidence must be logically relevant (to a material issue);
 2. The evidence must be necessary to assist the trier of fact;
 3. The evidence must not be subject to any other exclusionary rule;

4. The expert must be properly qualified, which includes a requirement that the expert be willing and able to fulfill the expert's duty to the court to provide evidence that is impartial, independent, and unbiased; and

5. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose.

[10] If, at this first stage, the evidence does not meet those criterion, it should not be admitted.

[11] Although the first criterion in the Threshold Requirements is framed as "logical relevance", that must, of course, be measured in relation to a material issue. The question is whether, as a matter of logic and human experience, the expert opinion will tend to prove or disprove the fact in issue (See for example: *R. v. Arp*, [1998] 3 S.C.R. 339 at 360).

[12] The second criterion in the Threshold Requirements, necessity, will be established when expert opinion evidence:

1. provides information that is likely to be outside the experience or knowledge of the trier of fact;
2. will assist the trier of fact to appreciate technical dimensions of the matter in issue; and
3. relates to something about which ordinary people are unlikely to form a correct opinion without expert assistance: *Mohan* at 23- 24.

[13] Because knowledge and norms change so quickly, and may even differ from one community to the next, necessity must be determined on a case-by-case basis: *R. v. F.(D.S.)* (1999), 43 O.R. (3d) 609 (Ont. C.A.).

[14] Argument in the guise of opinion runs afoul of the necessity criterion: *Sengbusch v. Priest*, [1987] B.C.J. No. 973 (S.C.).

[15] Regarding the third criterion in the Threshold Requirements (other exclusionary rules), an exclusionary rule that has been argued in this case is the rule against allowing an expert to opine on issues of credibility. Triers of fact do not need expert assistance in assessing the credibility of witnesses.

[16] Regarding the fourth criterion in the Threshold Requirements, properly qualified experts must have special or peculiar knowledge acquired through study or experience: *Mohan* at 25. They must also be impartial, independent, and unbiased. The Court in *White Burgess* explained at para. 10, in part:

expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted.

[17] The question here is actual bias, not apprehension of bias:

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

White Burgess at para. 50.

- [18] Once an expert attests or swears to this duty, there is an evidential burden on the party opposing admission to show a realistic concern that the expert is unable or unwilling to comply with a duty of impartiality, independence, and lack of bias. If shown, the burden returns to the proffering party to "establish on a balance of probabilities this aspect of the admissibility threshold": para. 48.
- [19] Exclusion at the threshold stage on this criterion will be rare:
- [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

White Burgess at para. 49.

- [20] Of course, experts are usually retained, instructed, and paid by one of the parties. This fact alone does not indicate a lack of "impartiality, independence, and bias": White Burgess at para. 32.

- [21] The fifth criterion of the Threshold Requirements regarding the reliability of novel science is not applicable to the case at bar.
- [22] If the Threshold Requirements are met, the court retains the discretion to exclude evidence if the risks in admitting the evidence outweigh its benefits. This is the second stage, the "Gatekeeper Stage".
- [23] While this second stage, the Gatekeeper Stage, has been described in many ways, it is best thought of as an application of the general exclusionary rule. A trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process, considering factors and paying ongoing attention to the questions of relevance, necessity, reliability, and absence of bias, independence, and impartiality. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *R. v. Bingley*, 2017 SCC 12 at para. 16.
- [24] The Court in *White Burgess* clarified that concerns of impartiality or bias come into play in both the Threshold Requirement criterion of a properly qualified expert as well as in the gatekeeping cost/benefit analysis: *R. v. Abbey*, 2017 ONCA 640 and *J.P. v. British Columbia*, 2017 BCCA 308.
- [25] After that point, if the expert evidence is admitted, the trial judge has an ongoing duty to ensure that any testimony given by the expert remains within the proper boundaries of expert evidence: *R. v. Sekhon*, 2014 SCC 15 at para. 46.

Discussion

- [26] The only evidence tendered on this voir dire was Dr. Laidlow's report of September 13, 2016. His personal qualifications are found within Appendix 3. No issue was taken with the fact that Dr. Laidlow is a highly trained and qualified psychiatrist.
- [27] Dr. Laidlow was asked by the defendants to conduct an independent medical examination of the plaintiff in order to assist in understanding the nature of the injuries sustained by her as a result of the two car accidents. He carried out an examination of her on August 22, 2016, and reviewed a number of documents that he itemized at Appendix 1, including a number of notes and records from various medical centres, and then he prepared his report.
- [28] By way of brief overview, his report is 14 pages long and divided into two main sections. The first is entitled "Facts and Assumptions" and the second is entitled "Opinion."
- [29] Under the first heading are several subheadings: "Chief Complaints," "Significant Prior Health Problems," "History of the Motor Vehicle Accident, January 30, 2009," "Immediate Symptoms and Trend Following the First Accident," "History of the Motor Vehicle Accident, March 22, 2010," "Immediate Symptoms and Trend Following the Second Accident," "Investigations, Treatment, and Response to Treatment," "Trend and Current Symptoms," "Vocational Limitations," "General Limitations," "Examination Findings."

- [30] Under the second heading ("Opinion") are several subheadings: "Preamble," "Relevance of Past Medical Problems," "Diagnosis and Causation of Her Post-Accident Medical Symptoms," "Role of Additional Investigations," "Suggestions for Treatment," "Disability Related to Her Accident Injuries," and "Prognosis."
- [31] In summary, Dr. Laidlow opined that Ms. Airavelle suffered a temporary aggravation of her lower back pain in the accidents and suffered a musculoligamentous strain of the cervical and upper spine (whiplash associated disorder type 2) in both accidents, but that she has no physical limitations, is capable of performing any work and recreation, requires no assistance, and has a good prognosis as long as she tries to become more active.
- [32] The plaintiff takes the position that the tone and some of the reports' contents form a sufficient realistic concern that Dr. Laidlow is unable or unwilling to comply with his duty of impartiality, independence, and lack of bias. In short, counsel for the plaintiff argues that Dr. Laidlow uses language that reflects conclusions on the plaintiff's credibility, repeats certain irrelevant information, strays into areas outside the scope of his expertise or into the general knowledge of non-experts, and/or is conclusory on ultimate issues. These things, she argues, considered cumulatively, demonstrate advocacy rather than independence, impartiality, and objectivity. Although the plaintiff's primary position seeks to have the report excluded from the jury's consideration in its entirety, the plaintiff's alternative position is to have the offending portions redacted from the report.
- [33] With respect to the Threshold Requirements, the defendants submit the plaintiff has adduced no evidence and has failed to identify anything within the four corners of the report that show a realistic concern that Dr. Laidlow is unable or unwilling to comply with his duty of impartiality, independence, and lack of bias. Counsel for the defendants highlight that Dr. Laidlow's attestation at the beginning of his report that he is aware of his duty to assist the court and not be an advocate for any party is unchallenged on this voir dire.
- [34] With respect to the Gatekeeper Stage, the defendants submit that the probative value of the report is high. It is the only evidence to be adduced by the defendants in this trial. The plaintiff adduced expert opinion evidence regarding the nature of her injuries, causation, prognosis, and recommendations for the future. Dr. Laidlow offers opinions in those same areas which is evidence that, it is argued, will be beneficial to the jury in determining the issues before it. They argue that the plaintiff has identified no prejudice to her by the report's admission.
- [35] Nevertheless, the defendants take a cautious approach with the jury and have agreed in advance of the voir dire to redact certain portions of Dr. Laidlow's report, particularly those portions that are unnecessary to his opinion.
- [36] Looking first at the Threshold Requirements.

[37] The plaintiff's central allegation here is one of bias, an allegation to be considered in the context of the fourth criterion of the Threshold Requirements - a properly qualified expert.

[38] Dr. Laidlow expresses a clear awareness of his duties to assist the court and not be an advocate for any party, as he clearly expresses on the face of his report. This is in accordance with Rule 11-2 of the Supreme Court Civil Rules which provides:

Duty of expert witness

(1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

Advice and certification

(2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she

(a) is aware of the duty referred to in subrule (1),

(b) has made the report in conformity with that duty, and

(c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

[39] I am not satisfied the plaintiff has shown there is a realistic concern that Dr. Laidlow is unable or unwilling to comply with that duty. There is nothing in the report itself, which is the only evidence tendered by either party on the voir dire, that itself is a clear indication of his inability or unwillingness to do so. Viewed as a whole, the report appears to be an objective assessment of the questions at hand. It is independent in that there is no suggestion that Dr. Laidlow was influenced by the defendants or counsel, that he is related to the defendants, or that he has an interest in the outcome of these proceedings. I do not see Dr. Laidlow's report reflecting any bias in the sense that it does not seem to unfairly favour the defendants' position over the plaintiff's. There is nothing to suggest a clear unwillingness or inability to provide fair, objective, and non-partisan evidence.

[40] The plaintiff makes no submissions on the first three criterion of the Threshold Requirements. Nevertheless, I am satisfied that the report is relevant to material issues in the trial and is necessary. Other than a very minor aspect that suggests an opinion on credibility of the plaintiff which can easily be redacted, I am satisfied the report is not subject to an exclusionary rule. The defendants have already agreed to remove a single word from a sentence in the middle of page 4 that might be suggestive that the plaintiff ought not be believed (the word "but" from the sentence that reads: "Further reviews occurred on March 9, April 3, and May 28, 2019 and Tegan was noted to have complaints of pain in the upper back but her range of motion was found to be normal").

- [41] I reach a similar conclusion in respect of another sentence at page 14. Dr. Laidlow writes: "I have no explanation for Tegan believing that she is limited in standing, sitting, and lifting," under the heading, "Disability Related to Her Accident Injuries." In context, the language used by Dr. Laidlow in this sentence impermissibly, in my view, conveys critical comment on the plaintiff's credibility and should be redacted.
- [42] Satisfied that the Threshold Requirements are met, I turn now to my gatekeeping function.
- [43] The plaintiff did not make specific submissions on the cost benefit analysis. The report is essential to the defendants. Indeed, it is their only evidence. I am satisfied that Dr. Laidlow's report and opinion will assist the trier of fact in understanding the plaintiff's injuries, causation, prognosis, and future treatment options. However, I find that there are areas that are prejudicial, as they are unnecessary or irrelevant to his opinion or outside the scope of his expertise, creating the very real potential of causing confusion for the jury. When I consider these discrete flawed areas in light of the report as a whole, I conclude that Dr. Laidlow's report is not so flawed that it should be ruled wholly inadmissible.
- [44] Rather, I conclude the appropriate remedy is to redact the objectionable passages. It is unnecessary for me to consider all of the areas subject to criticism as the defendants have reasonably agreed to redact many of the words, sentences, and paragraphs suggested by the plaintiff.
- [45] Redacted by agreement were the following:

(From pages 2-3):

There seems to be an indication that Tegan was affected by previous pelvis pain that may or may not be separate from the low back and sacroiliac pain noted to be present above. On October 25, 2011, Dr. Baikie indicated that Tegan had been bothered with pelvic pain since the age of 10. On November 29, 2012, Dr. Baikie, a Gynecologist, noted that Tegan had chronic abdominal and pelvic pain which in the past had been treated with diagnostic laparoscopy, removal of her appendix and treatment for pelvic inflammatory disease.

(From page 6):

and to be unconscious and that her boyfriend had to give her CPR on 12 different occasions. Each CPR would revive her and an ambulance was not called. She was noted to be quite upset, extremely loud and argumentative with staff on her arrival to the hospital. She was described as being almost histrionic in her behaviour with pain amplification type behaviors. She indicated that she could not have a cloth over her eyes because she was claustrophobic. The note indicates that after that, Tegan was found to again be unresponsive during the evening with no palpable pulse and given more CPR.

On November 18, 2012, Dr. Chapple outlined a consultation report related to Tegan's stay at the Royal Inland Hospital. She described episodes where she would stop breathing which had led to her going to the hospital. She was noted to be difficult to examine. It was noted that she accidentally bumped the bed and this had resulted in Tegan becoming hysterical with crying. There were noted to be significant inconsistencies in the examination.

[46] I also find that the following sentence from page 9 ought to be redacted:

She also advised me that she had been prone to pelvic pain that, related to gynecological problems.

[47] Here, I agree with the plaintiff's position that this sentence, located where it is in the body of the report, may give the jury the false impression that the plaintiff's gynecological problems, which are unrelated to her accident injuries, might somehow factor into the doctor's opinion. Relaying this background information here in his opinion section, particularly where it was relayed in an earlier section of his report, gives emphasis to something that is irrelevant to his ultimate opinions and could confuse or mislead the jury. It should be redacted.

[48] I also find that the following sentences from page 10 ought to be redacted:

She was continuing to have abdominal and pelvic pain, which did result in a laparoscopy and the removal of a normal appendix. She presented in 2012 to the Royal Inland Hospital with the complaints of recurrent cardiac arrests. There was noted to be some significant inconsistencies in her presentation and no abnormality was found.

[49] Not only is this irrelevant to the doctor's opinion, potentially confusing the jury, the last sentence merely repeats an earlier redacted sentence, where Dr. Laidlow is interpreting another doctor's notes.

[50] I also find that at page 10, under the heading, "Relevance of Past Medical Problems," the last sentence in the first paragraph is irrelevant to Dr. Laidlow's opinion and ought to be redacted:

She also indicated that she had been prone to abdominal and pelvic pain which she attributed to gynecological problems.

[51] As well, I conclude that at page 10, the last sentence, continuing on to the top of page 11, again, the plaintiff's genealogical problems are irrelevant to Dr. Laidlow's opinion and ought to be redacted:

Tegan did have a history of pelvic pain since the age of 10. Dr. Baikie, in a record of November 29, 2012, indicated that this chronic abdominal and pelvic pain had been treated with diagnostic laparoscopy, removal of a normal appendix and treatment for pelvic inflammatory disease.

[52] With respect to the last sentence of the first full paragraph on page 11, I agree with the plaintiff's position that this is outside the scope of the doctor's expertise and irrelevant to his opinion. It too should be redacted.

[53] I also conclude that the following sentences from page 14 ought to be redacted:

Some of the occurrences that she has had in the Emergency Room recorded very unusual behavior. I feel that a psychiatric review would be appropriate in order to help her and assist her in coping with her complaints of discomfort and evaluating the possible presence of any underlying mental health condition.

[54] I think the benefits in admitting this evidence are outweighed significantly by potential harm to the trial process they may cause. Dr. Laidlow has taken one aspect of the plaintiff's medical records from 2012 recording information given by another person, potentially from another source, in an area outside of his expertise and made a generalized recommendation that the plaintiff needs psychiatric help. Given its tenuous foundation, the value of this opinion is very low and its admission would run the very real risk of confusing the jury and is highly prejudicial.

[55] Finally, the following sentence at page 14 also must be redacted:

I have no explanation for Tegan believing that she is limited in standing, sitting, and lifting.

[56] This sentence adds nothing to Dr. Laidlow's admissible opinion which is expressed in the sentence immediately preceding it.

[57] The wording of the offending sentence suggests that Dr. Laidlow does not believe the plaintiff's claim that she is limited in standing, sitting, and lifting. As a comment on her credibility, which is something for the jury to decide, this sentence should be redacted. It is irrelevant and potentially highly prejudicial.

[58] Once redacted in accordance with this ruling, Dr. Laidlow's report is admissible and may go to the jury.

"S.A. Donegan J."

DONEGAN j.

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