

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation: Ocean v. Economical Mutual Insurance Company,
2010 NSSC 315**

**Date: 20100805
Docket: Hfx No. 190673
Registry: Halifax**

Between

MAY OCEAN, of White's Lake, in the Province of Nova Scotia

Plaintiff

-and-

THE ECONOMICAL MUTUAL INSURANCE COMPANY, a
body corporate, registered to carry on business in the Province
of Nova Scotia and **RAYMOND PATRICK SULLIVAN** of Lantz,
in the Province of Nova Scotia.

Defendants

Judge: Deborah K. Smith, Associate Chief Justice

Heard: July 16, 2010 in Halifax, Nova Scotia

Written Decision: August 5th, 2010

Counsel: May Ocean for the Plaintiff (Self-represented)

**C. Patricia Mitchell & Scott R. Campbell for the Defendant,
Economical Mutual Insurance Company**

**Megan M. Roberts for the Defendant, Raymond Patrick
Sullivan (Watching brief only on this motion)**

By the Court:

[1] May Ocean (the Plaintiff in this action) was involved in a motor vehicle accident with Raymond Patrick Sullivan on December 13th, 2000. It is acknowledged by all parties that Mr. Sullivan was an uninsured motorist at the time of the collision.

[2] On December 5th, 2002, Ms. Ocean filed an action in the Supreme Court of Nova Scotia against Mr. Sullivan and her own Insurer, Economical. The action against Economical was for what is commonly known as a Section D claim. At the time that Ms. Ocean filed her action she was represented by counsel. She has since become self-represented and has amended her pleadings to include a negligence and bad faith claim against Economical.

[3] Ms. Ocean has authored two reports that she intends to introduce as experts' reports at the time of trial. The first report was filed with the Court on July 7th, 2008 and is in excess of 150 pages. The second report (most recently filed on June 10th, 2010) is in excess of 5000 pages (including attachments.) Some of this second report was filed on a CD.

[4] Economical has brought a motion for an Order striking or otherwise excluding both experts' reports from admission at trial. Alternatively, Economical seeks an

Order requiring that the reports comply with the Civil Procedure Rules before they can be admitted at trial.

[5] At the hearing of this motion, I raised the preliminary issue of the ability of the Court to rule on the admissibility of evidence prior to the trial. This is not usually done in civil matters although it has been done in the case of *Lunenburg Industrial Foundry and Engineering Ltd. v. Commercial Union Assurance Co. of Canada* 2005 NSSC 62 and in *Hanna v. Hamlyn*, unreported, Hfx. No. 220924 – oral decision rendered on February 4th, 2010. Both of the parties involved in this motion have advised the Court that they would like a ruling on the admissibility of these reports prior to the trial. In light of this – and in light of the fact that I am the trial judge scheduled to hear this case – I am prepared to do so. The issue of whether such a ruling could be given absent such consent will be left for another day.

[6] In order to appreciate the motion before me it is necessary to give some background information relating to this claim.

[7] Ms. Ocean suggests that she suffers from Post Traumatic Stress Disorder as a result of the accident that occurred on December 13th, 2000. She further suggests that

as a result of her injuries she has developed enhanced cognitive skills that have allowed her to discover “the Root Language of Mankind”. She also believes that “there exists a parallel world” and that “Homo Sapien Sapiens are in fact highly evolved, perfectly conjoined twins”. Further, she says that she has discovered that there is a conspiracy within the insurance industry and she talks of an illegal monopoly and conglomerate activity within the said industry. She says that she intends to reveal these discoveries at the time of trial as proof of what she has “suffered” as a result of the accident. Her reports deal with these and other issues.

[8] In the written materials that Ms. Ocean filed with the Court in response to this motion, she also indicated that she is intending to introduce these reports to refute a diagnosis which has been made by Dr. Edwin Rosenberg. Dr. Rosenberg is a psychiatrist who saw Ms. Ocean at the request of Economical. In previous proceedings it has been disclosed that Dr. Rosenberg is of the opinion that Ms. Ocean suffers from a delusional disorder, persecutory type. Ms. Ocean wants to refute that diagnosis through her experts’ reports.

[9] The reports that Ms. Ocean has filed with the Court are difficult to describe. The first report contains background information on Ms. Ocean and her work history

and has attached to it copies of artwork that she has designed as well as materials dealing with the Root Language of Mankind.

[10] The second report is much more voluminous and includes, *inter alia*, affidavits of individuals, legal arguments and submissions, excerpts from “blogs”, numerous articles (on topics ranging from “Explaining and Inducing Savant Skills” to “Corruption” to “Lobotomy”), transcripts and excerpts from proceedings held in this matter to date, copies of “Emails and Gmails” from various people and the like.

[11] When asked by the Court what Ms. Ocean purported to be an expert in, she indicated that she is an expert researcher. When asked what she is giving an expert opinion on – she indicated that she is attempting to give an expert opinion on what she suffered as a result of the accident (particularly the psychological effects of the accident) and the effect of that suffering. She says that in her view she should be “expert on her own life”.

[12] The first issue that the Court must deal with is whether the 1972 Civil Procedure Rules or the new Civil Procedure Rules apply to this motion. As indicated previously, Ms. Ocean’s action was filed on December 5th, 2002. Economical filed

a Notice of Trial and Certificate of Readiness on April 18th, 2007. Rule 92 of the new Civil Procedure Rules deals with the transition from the 1972 Rules to the new Rules and provides:

Effective date of these Rules

92.01 These Rules take effect on January 1, 2009 except as provided in this Rule.

Application to outstanding proceedings

92.02 (1) These Rules apply to all steps taken after January 1, 2009 in an action started before January 1, 2009, unless this Rule 92 provides or a judge orders otherwise.

.....

Outstanding interlocutory steps

92.04 Each of the following steps that is outstanding in an action on January 1, 2009 must be completed under the *Nova Scotia Civil Procedure Rules* (1972), unless the parties agree or a judge orders otherwise.

.....

(g) in an action in which a party files a notice of trial before that date, the assignment of trial dates, delivery of an expert's report, and discovery;

.....

[Emphasis added]

[13] In *Marshall (Litigation Guardian of) v. Annapolis County District School Board*, 2009 NSSC 203 and 2009 NSSC 376 the Court dealt with the issue of the timing of the delivery of an expert's report in a situation in which the action was commenced before the new Rules were in force but an expert's report was delivered

after the new Rules were in force. The Court determined that the 1972 Rules applied to the timing of the delivery of the expert's report.

[14] The timing of the delivery of Ms. Ocean's reports is not in issue in this case. What is in issue is the form of the reports and whether the 1972 Rules apply to the form of the reports or whether the present Rules are applicable.

[15] As noted by Justice Moir in *Marshall (Litigation Guardian of) v. Annapolis County District School Board*, 2009 NSSC 203 at ¶ 13:

The present Rules contain provisions for disclosure of intended opinion evidence that are significantly different from those on that subject from the former Rules. Our present Rules on that subject compare much more closely with the English practice than with the practice under our former Rules. The differences are great enough that the new Rules could not reasonably be applied to many actions that were mature before the new Rules came into effect.

[16] In the case before me, Economical filed a Notice of Trial on April 18th, 2007. A number of experts' reports were prepared prior to that date, the form of which would be governed by former Civil Procedure Rule 31.08(1). While this case has taken many twists and turns since that time, I am satisfied that it is sufficiently advanced that it is appropriate that the form of all reports should be measured against former Civil Procedure Rule 31.08(1) rather than have some of the reports being

measured against the former Rule (31.08(1)) and others being measured against the present Rule (55.)

[17] Former Rule 31.08 provides:

Expert witness: Evidence of and report

31.08 (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been

(a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and

(b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial,

the evidence of the expert shall not be admissible on the trial without leave of the court.

.....

(3) If the report of an expert does not comply with the requirements of rule 31.08(1), a judge may on the application of an opposite party make an order requiring the party providing the report to comply with rule 31.08(1) and if such an order is granted, the applicant shall have costs in any event.

[18] In my view, the reports that Ms. Ocean has filed with the Court do not comply with the requirements of former Civil Procedure Rule 31.08(1). It is difficult, when reading these reports, to find any expert opinion, the essential facts upon which the opinion is based or a summary of each opinion expressed. What Ms. Ocean has done is take the opinions of a number of people, bind them together in a document (along with a number of other materials) and called it an expert's report. Calling a document an "expert's report" does not make it an expert's report.

[19] The reports that Ms. Ocean has filed are not experts' reports, do not comply with Civil Procedure Rule 31.08(1) – and are not admissible at trial as experts' reports.

[20] Former Civil Procedure Rule 31.08(3) provides that if the report of an expert does not comply with Rule 31.08(1) a judge may require the party filing the expert's report to comply with Rule 31.08(1). I am not prepared to do that in this case.

[21] Leaving aside the question of whether Ms. Ocean is an expert researcher (no arguments were made on this issue), I am not satisfied that it would be appropriate for her to prepare an amended report that complies with former Civil Procedure Rule 31.08(1).

[22] An expert witness is expected to be objective and independent of the litigation. Ms. Ocean is the Plaintiff in this action. In my view, it is impossible for her to be objective and independent while also being the Plaintiff.

[23] This issue was dealt with in the case of *Handley v. Punnett*, 2003 BCSC 294, which involved a dentist who was being sued for professional negligence and who wanted to express an expert opinion at trial. During the course of rendering his decision Burnyeat, J. stated at ¶ 19 - ¶ 20:

[19] Fourth, I can not be satisfied that it would be appropriate to hear the opinion that Dr. Punnett wishes to give. It can not be said that a party can provide an objective opinion to the Court. It is highly unlikely that a party could stop being an advocate for a particular conclusion and become an unbiased observer who is entitled to express an expert opinion. In **B(W.R.) v. Plint** (1998), 56 B.C.L.R. (3d) 214 (B.C.S.C.), the Court refused to allow a report to be admitted into evidence partially on the basis that there were serious questions as to whether the report had “.....the objectivity the Courts insist be displayed by expert witnesses....” (at para. 14). I have the same reservations here. I am satisfied that it would be an almost insurmountable barrier for a party to be in a position to express an expert opinion.

[20] Fifth, even if it could be said that the opinion of Dr. Punnett was admissible, when an expert is also a party I am satisfied that virtually no weight should be given to the expert opinion. I am satisfied that virtually no weight should be given to his opinion. In those circumstances, the object of the Rules to secure a “speedy and inexpensive” determination on its merits can not be well-served by hearing evidence that should be given virtually no weight.

[24] In my view, it would be impossible for Ms Ocean to be both the Plaintiff in this action and an objective, unbiased expert. Therefore, I will not order that Ms. Ocean’s reports be made to comply with former Rule 31.08(1).

[25] Economical's motion to exclude Ms. Ocean's two reports from admission at trial is granted. Nothing in this decision will prevent Ms. Ocean from adducing relevant and admissible evidence at the time of trial. For example, she is obviously entitled to testify at the damages stage of this proceeding as to how the injuries that she says she suffered as a result of the collision have affected her. However, she will not be able to testify as an expert.

[26] There is one additional matter that I wish to deal with. In the materials filed by Ms. Ocean in response to this motion she referred to the fact that her initial report was filed with the Court on July 7th, 2008 apparently without any indication by Economical's solicitor that Economical intended to challenge the admissibility of that report. She says that since no one indicated any objection to that report she was encouraged to prepare her second report.

[27] While it would have been preferable for Economical to advise Ms. Ocean in a timely manner that it would be objecting to the admission of her first report, any failure to do so would not, in my view, affect the admissibility of the report. I should indicate that the new Civil Procedure Rule (55.10(1)) which requires a party to notify

an opposite party in a reasonable time of an objection concerning the form of a report was not in effect at the time that this first report was filed with the Court.

[28] Economical is awarded costs of this motion in the amount of \$750.00 plus disbursements in the amount of \$150.00. Such costs and disbursements are to be paid by the Plaintiff to Economical upon the release of the Court's decision on damages or upon such earlier date as may be set by the Court in the event that neither of the Defendants are found liable to the Plaintiff.

Deborah K. Smith
Associate Chief Justice