NOVA SCOTIA COURT OF APPEAL
Citation: *McKinnon Estate v. Cadegan*, 2021 NSCA 79

Date: 20211123
Docket: CA 502814
Registry: Halifax

Between:

The Estate of Leroy McKinnon, Maureen McKinnon, Amy McKinnon, Jill McKinnon, Kate McKinnon, Oliver Kent, by his litigation guardian, Maureen McKinnon, Hudson Kent, by his litigation guardian, Maureen McKinnon, Riley Gagnon, by her litigation guardian, Maureen McKinnon, and Piper Gagnon, by her litigation guardian, Maureen McKinnon

Appellants

v.

Perry Kent Cadegan

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	October 14, 2021, in Halifax, Nova Scotia
Subject:	Evidence – Hearsay Jury Trial – Instructions and Jury Questions
Summary:	Leroy McKinnon passed away from a heart attack. His estate and beneficiaries sued his family doctor for negligence in the treatment of severe diarrhea which allegedly contributed to his death. Following a jury trial the action was dismissed because causation was not proven. The estate and beneficiaries appealed alleging errors by the trial judge in admitting handwritten notes of Mr. McKinnon and in not adequately instructing the jury with respect to those notes. They also allege a question from the jury during deliberations was not properly answered.

Issues: (1) Were the notes of Mr. McKinnon properly admitted as hearsay?
(2) Were the trial judge's jury instructions with respect to the notes deficient?
(3) Was the trial judge's response to the jury's question sufficient?

Result: The notes of Mr. McKinnon should have been treated as an admission by a party which makes them presumptively admissible. This was not one of the rare cases where exclusion could be justified. Alternatively, the trial judge's admission of the notes under the principled exception in *Khelawon* was proper.

The trial judge's jury instructions concerning the notes were deficient because they suggested he had determined them to be reliable. He failed to tell the jury that ultimate reliability of the notes was for them to determine. This error made the instructions potentially misleading. Given the significance placed on the notes by the defence, particularly on the issue of causation, there was a risk the verdict was impacted. The proper remedy was to set aside the verdict and order a new trial.

The trial judge's handling of the jury's question and response was appropriate.

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Appellants

v.

Perry Kent Cadegan

Respondent

Judges:	Wood, C.J.N.S.; Farrar and Derrick, JJ.A.
Appeal Heard:	Thursday, October 14, 2021, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Wood, C.J.N.S.; Farrar and Derrick, JJ.A. concurring
Counsel:	Raymond F. Wagner, QC, Nicholas Hooper and Kathleen Mitchell, for the appellants Stewart Hayne and Ryan Lebans, for the respondent

Reasons for judgment:

[1] Leroy McKinnon passed away on January 28, 2015, after suffering a cardiac arrest two days earlier. In January 2016, his estate and beneficiaries filed a claim against a number of physicians and the Nova Scotia Health Authority alleging negligence in the treatment of Mr. McKinnon in the weeks prior to his death.

[2] Notices of Discontinuance were filed with respect to the claims against all of the defendants except for Perry Kent Cadegan, who was Mr. McKinnon's family physician. A jury trial took place in October and November 2020 before the Honourable Justice Patrick J. Murray of the Nova Scotia Supreme Court. The jury found that Dr. Cadegan had breached the standard of care in relation to his treatment of Mr. McKinnon in two respects: failure to inform Mr. McKinnon of a diagnosis and failure to follow up with a specialist to obtain an alternate treatment plan. However, the jury concluded Dr. Cadegan's breaches of the standard of care did not cause Mr. McKinnon's death and, as a result, the action was dismissed.

[3] Mr. McKinnon's estate and beneficiaries appeal the dismissal of the action alleging the following errors on the part of the trial judge:

1) Improperly admitting hearsay evidence in the form of notes alleged to be prepared by Mr. McKinnon;
2) Failure to adequately instruct the jury on the weight and scope to be afforded to the hearsay evidence; and
3) Inadequately responding to a question posed by the jury during their deliberations.

[4] For the reasons that follow, I have concluded that the appeal should be allowed as a result of deficient jury instructions.

Background

[5] In the fall of 2014, Mr. McKinnon was a healthy and active 67 year old. He was also a prolific note taker. His widow, Maureen McKinnon, testified that her husband made notes about almost everything during the course of their marriage. In November 2014, Mr. McKinnon developed severe diarrhea for which he sought treatment from Dr. Cadegan. His health deteriorated, and he was hospitalized for two weeks in December. He was referred to a gastroenterologist. There were

several medical opinions concerning the cause of Mr. McKinnon's diarrhea, but he was never given a definitive diagnosis.

[6] Mr. McKinnon was discharged from hospital on December 16, 2014. He was monitored by Dr. Cadegan with appointments on December 22 and 29, 2014, and January 15, 2015. He continued to experience diarrhea but the severity, and whether he was improving, were live issues at trial.

[7] Mr. McKinnon suffered a cardiac arrest on January 26, 2015 resulting in significant neurological damage. He passed away two days later.

[8] Both parties presented expert evidence on the standard of care and whether any breach of the standard by Dr. Cadegan contributed to Mr. McKinnon's death.

[9] The appellants' theory of causation was that Mr. McKinnon's prolonged and severe diarrhea resulted in low levels of potassium and magnesium in his blood, increasing his risk for cardiac arrhythmia, which ultimately led to his cardiac arrest and death. Dr. Cadegan's position was that Mr. McKinnon's death was a sudden and unpredictable event, most likely the result of risk factors including hypertension and advanced age. He argued there was no proof the low levels of potassium and magnesium were related to Mr. McKinnon's death.

[10] The appellants tried to establish that Mr. McKinnon's diarrhea was severe from the time of his hospital discharge on December 16, 2014 until his death. They said it was obvious to an observer that his health was deteriorating and Dr. Cadegan failed to adequately assess and treat his condition. They relied on the evidence of Mrs. McKinnon, who testified about what she observed and her husband's description of his health. Dr. Cadegan, on the other hand, argued the diarrhea had abated after Mr. McKinnon's hospital treatment and his condition continued to improve. He denied any negligence in his treatment of Mr. McKinnon.

[11] During the course of the litigation, Mrs. McKinnon produced handwritten notes, which she said were prepared by her husband. They contained a listing of dates and times for the period from December 16, 2014 to January 26, 2015. For each day, there were one or more time entries. There were also Xs on the dates that Mr. McKinnon had appointments with Dr. Cadegan, as well as the name of the medication he had been prescribed. Found with these notes was another set of entries for the same period showing daily blood pressure readings. According to

Mrs. McKinnon, she and her husband had obtained a home monitor after Mr. McKinnon was prescribed medication for high blood pressure.

[12] Dr. Cadegan wanted the jury to see the handwritten notes because he argued they represented a record of bowel movements which indicated their frequency was subsiding in January 2015. This was an indication Mr. McKinnon's diarrhea was improving. The appellants' position was that the notes were hearsay and did not meet the test for admissibility, in part, because there was uncertainty about what information had been recorded by Mr. McKinnon.

Voir Dire re Admissibility of Notes

[13] The trial judge conducted a *voir dire* with respect to the admissibility of the handwritten notes. Dr. Cadegan said they were admissions made by an adverse party, which is one of the traditional common law hearsay exceptions. In the alternative, he argued they were admissible under the principled exception set out by the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57. In other words, the notes were necessary and sufficiently reliable that the jury should be allowed to consider them. In addition, according to Dr. Cadegan, their probative value exceeded any prejudicial effect.

[14] The appellants said the notes were not sufficiently reliable because the information recorded by Mr. McKinnon was not discernable. In addition, they argued they could not be treated as an admission by an adverse party because Mr. McKinnon was deceased. The appellants submitted the notes were potentially harmful to their case and should be excluded because this prejudice outweighed any probative value.

[15] The evidence at the *voir dire* was limited to the notes, Dr. Cadegan's chart entries for Mr. McKinnon's visits, and Mrs. McKinnon's testimony. She described her husband's practice of writing down everything that he wanted to remember, which he did throughout their marriage. As an example, she pointed out that Mr. McKinnon made notes of the daily results from the monitor they obtained after Dr. Cadegan prescribed blood pressure medication for him.

[16] In her direct examination, Mrs. McKinnon said she did not have actual knowledge of what information was recorded in the notes. She admitted it could be times when bathroom visits occurred and it would have been typical of her husband to do this. She pointed out that for some dates there was a single entry, and she did not recall any days when her husband only had one bowel movement.

The frequency of his bowel movements was something they discussed constantly; it literally controlled their lives. If the notes were a list of bowel movements, she thought it was incomplete.

[17] In cross-examination, Mrs. McKinnon said the notes were probably related to bathroom visits, but she did not know for certain.

[18] On October 22, 2020, the trial judge gave an oral decision on the *voir dire*. He indicated that he was reserving his decision on whether the notes could be treated as an admission by a party and proceeded to conduct an analysis under the principled exception to the hearsay rule found in *Khelawon*. He never ruled on whether the notes should be treated as an admission.

[19] Having considered the evidence of Mrs. McKinnon, the trial judge was satisfied the notes were made by Mr. McKinnon during the relevant time period. He concluded Mr. McKinnon was keeping records related to his health after his hospitalisation and, for him, frequency of bowel movements was a matter of utmost importance. The trial judge relied on Mrs. McKinnon's testimony the notes could have related to bathroom visits as well as the correlation between some of the entries and Dr. Cadegan's chart notes for Mr. McKinnon's visits in December 2014 and January 2015. He admitted the notes because he found they met the requirements of necessity and threshold reliability. He was not prepared to exercise his residual discretion to exclude this evidence because he felt it had the potential to be highly probative and this outweighed any prejudicial effect.

Jury Instructions

[20] There were two items of potential hearsay evidence which the trial judge had to consider. The first were the notes of Mr. McKinnon, which the defence wanted to introduce as a record of bowel movements. The second was Mrs. McKinnon's testimony about what her husband told her with respect to his health and bowel movements. The trial judge admitted both.

[21] At the close of the plaintiffs' case, the trial judge gave the jury what he referred to as a mid-trial instruction. A portion of it dealt with hearsay evidence. With respect to this issue, he told the jury:

> The first is hearsay evidence. You have probably all heard about hearsay evidence. As a general rule, testimony about what someone else said out of Court is not admissible to prove the truth, the truth of what was said. There are times when hearsay evidence can be admissible when in the circumstances it is found to

> be both necessary and reliable. At other times, it can be admitted when the purpose of the statement is not to establish its truth.
>
> As a general rule, however, testimony about what someone else said out of Court is not admissible to prove the truth of what he or she said. In my final instruction, I will provide a further explanation as it relates to the evidence at this trial.

[22] In his final instructions to the jury, the trial judge referred to the two items of hearsay evidence as follows:

> You have the notes before you entered as Exhibit 8. These notes are purported by the Defendant to be a record of the bathroom visits of Leroy McKinnon during the relevant time. That is for you to decide.
>
> The Plaintiff Maureen McKinnon stated in answer to those questions put to her in interrogatories, which are part of the same exhibit, that it's, quote, it's possible they are of her husband's bathroom visits, but she was uncertain. In her evidence at trial, she stated she really had no idea. And again, as she previously said, it was possible but she was not certain.
>
> The notes were allowed in evidence, even though they are hearsay, because I was satisfied that you should see them and make up your own mind as to what they are. You will remember I gave you an instruction on hearsay which I'm going to repeat.
>
> As a general rule, testimony about what someone else said out of court is not admissible to prove the truth of what was said. There are times when hearsay evidence can be admissible when in the circumstances it is found to be both necessary and reliable. At other times, it can be admitted when the purpose of the statement is not to establish its truth.
>
> You will recall that Maureen McKinnon was being questioned regarding her husband's episodes of diarrhea. She said a number of times she knew because she cleaned the toilet each day, was not in with him, but could also hear him during those times. Again, I was satisfied that Maureen McKinnon was close enough to the situation and to her husband throughout this medical difficulty to be able to speak about the diarrhea, and in particular whether he had achieved a formed stool.
>
> This evidence is hearsay because Leroy McKinnon is not here to tell it himself. Even though I allowed it, it is for you, ladies and gentlemen, to determine the weight, if any, you will give this evidence in the context of all the evidence.

[23] Following delivery of his instructions, the trial judge asked counsel if they had any concerns with respect to their content. No objections were made in relation to his treatment of the hearsay evidence.

Jury Question

[24] During their deliberations, the jury sent the following question to the trial judge:

> Was there any testimony from Maureen that Dr. Cadegan was told during Dr. visits from Dec 22 onward in his office that Leroy McKinnon was not eating?

[25] After receiving this question, the trial judge shared it with counsel and received submissions with respect to an appropriate response. The judge and counsel also listened to the recording of certain sections of Mrs. McKinnon's evidence. This review indicated that Mrs. McKinnon did not testify that she told Dr. Cadegan her husband was not eating. Despite this, counsel for the plaintiffs wanted to refer the jury to Mrs. McKinnon's evidence that Dr. Cadegan had put Mr. McKinnon on probiotics and this had improved his appetite. They argued this implied there must have been a discussion with Dr. Cadegan about Mr. McKinnon's appetite.

[26] The trial judge concluded the appropriate answer to the jury's question was simply "no", and he advised them accordingly.

Issues

[27] The Notice of Appeal listed five grounds of appeal. However, by the time the appellant's factum was filed, the issues had been reduced to the following:

1) Did the trial judge err in law by improperly admitting hearsay evidence?

2) Did the trial judge err in law by improperly and inadequately instructing the jury on the weight and scope to be afforded to the hearsay evidence?

3) Did the trial judge err in law by preventing the jury from hearing and interpreting evidence in response to a question posed during their deliberations?

Standard of Review

Admission of Hearsay Evidence

[28] A decision whether to admit hearsay evidence requires a trial judge to make factual findings, apply legal principles, and balance prejudicial effect against probative value. With respect to the application of legal principles, the standard of review is correctness. However, deference is owed to any factual findings and the

discretionary balancing exercise. This Court recently described the standard of review for evidentiary rulings in *R. v. Barrett*, 2020 NSCA 79:

> [7] The parties agree this ground of appeal—whether the judge erred in admitting the hearsay statement of a deceased witness—engages a standard of correctness. We must consider whether the judge correctly applied the law. That said, the judge's findings of fact and determination of threshold reliability are entitled to deference absent any palpable and overriding error. As recently stated by Newbury J.A. in *R. v. Moir*, 2020 BCCA 116:
>
> > [82] I proceed, then, on the basis that the standard of correctness governs the question of what 'test' or standard should be applied to admissibility, and to any other issue of principle; but that in the actual assessment or 'weighing' of the relevant factors, the trial judge should not be 'second guessed' by this court. As stated in *R. v. Berry* 2017 ONCA 17:
> >
> > > The exercise of weighing the probative value of proffered evidence against its potential prejudicial effect in the course of the dynamics of a trial is a discretionary task for which trial judges are particularly suited. Their decisions in that regard are entitled to deference.… Absent an error of law or principle, a material misapprehension of the evidence, or a palpable and overriding error of fact in the exercise of that discretion, there is no basis for an appellate court to interfere. [At para. 42.]
>
> (See also: *R. v. Youvarajah*, 2013 SCC 41 at para. 31; *R. v. Tsekouras*, 2017 ONCA 290 at para. 146; *R. v. Potter*; *R. v. Colpitts*, 2020 NSCA 9 at para. 518; *R. v. Lawrence*, 2020 ABCA 268 at para. 14).
>
> [8] In terms of balancing the factors to reach her decision on the admissibility of the statement, the judge is entitled to deference in relation to that analysis. As observed in *R. v. Chretien*, 2014 ONCA 403:
>
> > [44] The first concerns appellate deference. The factual findings that ground a trial judge's admissibility determination are entitled to deference from appellate courts. Trial judges are well placed to assess the hearsay dangers in individual cases and the effectiveness of any safeguards to assist in overcoming those specific dangers. Absent an error in principle, a trial judge's determination of threshold reliability is entitled to deference on appeal: *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 31; and *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 81.

Sufficiency of Jury Instructions

[29] The principles governing appellate review of jury instructions are well known. The Supreme Court of Canada summarized them in *R. v. Araya*, 2015 SCC 11:

> [39] When considering an alleged error in a trial judge's jury instructions, "[a]n appellate court must examine the alleged error in the context of the entire charge and of the trial as a whole": *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32, per LeBel J. Further, trial judges are to be afforded some flexibility in crafting the language of jury instructions: see *Hay*, at para. 48, citing *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 9. While trial judges must seek to ensure that their instructions adequately prepare the jury for deliberation, the standard for jury instructions is not perfection. Appellate review of jury instructions is meant to "ensure that juries are properly — not perfectly — instructed": *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 62, per Lamer C.J. This Court has emphasized that the charge generally should not be "endlessly dissected and subjected to minute scrutiny and criticism": *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163. As Bastarache J. has summarized it in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 30:
>
> > The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.
> >
> > Appellate courts should not examine minute details of a jury instruction in isolation. 'It is the overall effect of the charge that matters': *Daley*, at para. 31.

Jury Questions

[30] When reviewing a trial judge's response to jury questions, an appellate court does not afford deference. The British Columbia Court of Appeal in *R. v. Schneider*, 2021 BCCA 41 described the standard this way:

> [121] The appellant says that in responding to the jury's question, the trial judge erred in two ways: (1) she should have asked the jury for clarification on the question because it was ambiguous; and (2) she failed to answer the question correctly. Both issues involve questions of law, reviewable on a standard of correctness: *R. v. Brydon*, [1995] 4 S.C.R. 253 at para. 2; *Housen* at para. 8.
>
> […]
>
> [125] On the second of the alleged errors, the appellant also rightly states that questions posed by a jury must be answered "clearly, correctly and comprehensively". That is so even where the original instruction was correct: *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 530–31, 537; *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 759–60; *R. v. Naglik*, [1993] 3 S.C.R. 122 at 138–39.

Analysis

Issue 1 – Did the trial judge err in law by improperly admitting hearsay evidence?

[31] Dr. Cadegan wanted Mr. McKinnon's handwritten notes to be admitted and considered by the jury. Since the author of those notes was not available to testify and they were being proffered for the truth of their contents, they were hearsay and a *voir dire* was required. In his submissions to the trial judge, Dr. Cadegan argued the primary basis for admission of the notes was that they represented an admission by a party. Alternatively, he said they should be admitted under the principled exception to hearsay as outlined in *Khelawon*.

[32] Following the *voir dire*, the trial judge gave a decision admitting the notes under the principled exception, but he declined to decide whether they were an admission by a party. The trial judge was wrong not to address the admission issue; however, as I will explain, that does not assist the appellants.

[33] The development of the principled approach did not displace the traditional categories for hearsay exceptions. In fact, when evidence falls within an established common law exception, it will only be excluded in rare cases. The Supreme Court explained this in *Khelawon* :

> 42 It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, _ 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:
>
> > (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
> >
> > (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

> (c) In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[34] In light of the presumed admissibility of evidence falling within a recognized common law hearsay exception, it is important that a judge begin their analysis by considering the applicability of any such exceptions. The Ontario Court of Appeal in *R. v. Nurse*, 2019 ONCA 260 explained the rationale for doing so:

> [62 In this court, the parties placed little emphasis on the role of the traditional exceptions. Rather, they accepted the applicability of both exceptions, but focused their submissions solely on the principled approach to hearsay.
>
> [63] In my view, it is important to explore why the evidence is admissible under the two common law exceptions in play in this case, and how those exceptions themselves address reliability concerns associated with hearsay evidence. As I will discuss further, and Iacobucci J. noted in *Starr*, at para. 212, evidence falling within a traditional exception to the hearsay rule is presumptively admissible, as these exceptions "traditionally incorporate an inherent reliability component". Both exceptions engaged in this case are rooted in an acceptance that the circumstances in which the exception will be met are ones in which there is only a remote possibility of fabrication or concoction. The requirements or "test" for meeting these exceptions are strictly adhered to by courts, presumably in an effort to ensure that the exception is only applied in cases that remain true to the rationale underpinning the exception.
>
> [64] As noted above, in "rare cases" it is possible that despite falling with a traditional exception, the evidence may not meet the requirements of necessity and reliability. Indeed, Iacobucci J. recognized, at para. 155 of *Starr*, that "in the event of a conflict between the two, it is the principled approach that must prevail". However, the party challenging the presumptive admissibility of the evidence bears the burden of establishing a "rare case".
>
> [65] In the circumstances of the case at bar, the trial judge did not explain why he found that the "rare cases" threshold set out in *Starr* and *Mapara* had been met such that it was appropriate to consider the otherwise admissible hearsay evidence under the principled approach.

[35] As this passage indicates, once hearsay evidence is determined to fall within a common law exception, the burden shifts to the party opposing admission because inherent reliability is presumed. They must demonstrate the circumstances represent one of the rare cases where the evidence is not, in fact, necessary or

reliable. In contrast, under the principled approach, the burden remains on the proponent to establish that the evidence is both necessary and reliable.

[36] In my view, the proper sequence to be followed when considering the admission of hearsay evidence is as follows:

1. Can the proponent establish that the evidence falls within one or more common law exceptions?
2. If a common law exception applies, can the opposing party show this is the "rare case" where the evidence should be excluded because it is not necessary or reliable?
3. If it is not a "rare case", should the evidence be excluded because its prejudicial effect exceeds its probative value?
4. If not admissible as a common law exception, is the evidence admissible under the principled analysis from *Khelawon*?

[37] Where a statement is made by a party, either orally, in writing, or by conduct, it represents an admission. It should be presumptively accepted into evidence at the request of an adverse party provided it is relevant and its probative value is not exceeded by its prejudicial effect. Dr. Cadegan argued Mr. McKinnon's notes were an admission which meant the trial judge should have started his analysis with that question. He erred by not doing so.

[38] In the circumstances of this case, this Court should determine whether the notes were an admission despite the failure of the trial judge to deal with that issue. I say this because: 1) the trial judge made the necessary factual findings as part of his analysis concerning the principled exception; 2) the standard of review with respect to a determination of whether evidence is relevant is correctness (para. 29 in *Schneider*); 3) the appellants' arguments before the trial judge concerning reliability were, in reality, submissions with respect to relevance; and 4) the trial judge weighed the probative value and prejudicial effect of the notes.

[39] In *R. v. Ferris*, 1994 ABCA 20 (aff'd [1994] 3 S.C.R. 756), the court considered the admissibility of a portion of a telephone conversation between the accused and his father. A police officer testified that he overheard a "snippet" of the conversation which included the statement, "I killed David". The officer did not hear the words, which preceded or followed this phrase. The court held the threshold question with respect to admissibility is whether the statement at issue is

relevant. The court concluded the utterance of the accused, as described by the police officer, was not relevant:

> [15] To be relevant, the evidence must be probative of some fact in issue. Words do not become admissible merely because they are uttered out of the mouth of the accused. It is for the party tendering the evidence to prove the connection between the evidence tendered and the fact. In some cases the words may be relevant to the issue of credibility, but that is not the case here. There may be cases where the utterance of a single word (such as a code word) would go to prove the accused's knowledge of an important fact. The onus rests on the party tendering the evidence to prove the connection between the evidence offered and the fact. In this case the only possible relevance of these words is if they could be found to constitute an admission by the accused that he killed David. They are being tendered as proof of their contents. The issue here is not whether the officer is telling the truth that the accused uttered these words, but whether any meaning can be put on the words. Are they an admission? Certainly if they are, they are relevant and highly probative. While the jury ultimately makes that decision, the trial judge must determine whether there is evidence on which they could so decide.
>
> [16] The general rule for admissibility is that preliminary questions which are a condition of admissibility are for the trial judge in his or her capacity as judge of the law rather than judge of the fact. If factual questions must be resolved a *voir dire* may be required. (See *R. v. Evans*, unreported, October 21, 1993 S.C.C. #22592) In this case the factual question is whether or not there is a statement discernible of meaning. Authenticity of the words is not in issue - meaning is.
>
> […]
>
> [31] The trial judge must be satisfied there is some evidence upon which a jury could conclude the meaning of the uttered words. On the evidence introduced at the voir dire it would be impossible for a properly instructed jury, acting reasonably, to come to a conclusion as to what these words meant on any standard of proof. A trier of fact could not ascertain the accused's meaning when he uttered the words. Certainly, it would be impossible to conclude they constituted an admission made by the accused. Therefore the words are not logically probative of a fact in issue, are not relevant, are inadmissible and should not have been left with the jury.

[40] In *Schneider*, the British Columbia Court of Appeal considered the admissibility of similar evidence – an incomplete fragment of conversation. The court described the trial judge's role in determining whether evidence was sufficiently relevant to go to the jury:

> [69] Applying this framework, the appellant is wrong to say that in assessing relevance, the trial judge was obliged to determine—in fact—whether the

overheard words constituted an admission. Rather, the words said to have been spoken by the appellant were relevant if "capable of being an admission" (*Ferris* (C.A.) at paras. 26, 27, 29, 31, 38; emphasis added).

[70] At this stage of the admissibility analysis, a trial judge is concerned with logical relevance. As explained by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624, leave to appeal ref'd [2010] S.C.C.A No. 125, logical relevance requires:

> [82] … that the evidence have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence …. Given this meaning, relevance sets a low threshold for admissibility and reflects the inclusionary bias of our evidentiary rules ….
>
> [Internal references omitted; emphasis added.]

[71] In *R. v. Arp*, 1998 CanLII 769 (SCC), [1998] 3 S.C.R. 339, it was made clear that to be logically relevant, "an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to 'increase or diminish the probability of the existence of a fact in issue'. … As a consequence, there is no minimum probative value required for evidence to be relevant" (at para. 38; internal references omitted; emphasis added). See also *R. v. Blackman*, 2008 SCC 37 at paras. 29–30.

[72] The Crown sought to tender the words overheard by WS as an admission of responsibility for the death of Ms. Kogawa. Clearly, that was a material issue at trial. To meet its burden on logical relevance, the Crown was required to show that those words were capable of interpretation as an admission. In assessing whether the Crown met that burden, the question for the judge to decide was whether there was "some evidence upon which [the] jury could conclude the meaning of the uttered words": *Alcantara* at paras. 138–139.

[73] If the answer was "yes", the judge was obliged to move to the second stage of the analysis and determine whether she should keep the evidence from the jury because its prejudicial effect outweighed its probative value. It is only then that a trial judge engages in a weighing of the evidence, albeit on a limited scale. The purpose of the limited weighing is to assess legal relevance. Again, with reference to para. 82 of *Abbey*:

> … Relevance can also refer to a requirement that evidence be not only logically relevant to a fact in issue, but also sufficiently probative to justify its admission despite the prejudice that may flow from its admission. This meaning of relevance is described as legal relevance and involves a limited weighing of the costs and benefits associated with admitting evidence that is undoubtedly logically relevant ….
>
> [Internal references omitted; emphasis added.]

[41] The court summarized the principles to be applied as follows:

> [75] It is apparent from the *voir dire* ruling in this case that the trial judge correctly instructed herself on the legal principles she was bound to apply in determining admissibility. She asked whether there was some evidence upon which the jury could conclude the meaning of the words conveyed through WS (at para. 19). Once satisfied the evidence was logically relevant, she went on to assess legal relevance by asking whether its probative value outweighed the "prejudicial effect that it might be used improperly" (at para. 21).

[42] In *Ferris*, the statement was excluded because its meaning could not be discerned; whereas, in *Schneider* it was admitted because there was some evidence upon which a jury could determine the meaning of the utterances. The difference between the cases was the extent of the contextual evidence available in *Schneider*. In that case, the witness who testified about the conversation was the brother of the accused, and there had been several other discussions between them about the accused's relationship with the victim and the circumstances of her disappearance. This additional evidence created a framework within which the jury would be able to ascribe meaning to the conversation as described by the witness.

[43] In the present case, the severity of Mr. McKinnon's diarrhea and the frequency of bowel movements were significant issues at trial. As in *Schneider*, there was contextual evidence from which a jury might ascertain the meaning of the notes. This included:

- Mr. McKinnon was a prolific notetaker throughout his life and recorded anything that he wished to remember.
- In late 2014 and early 2015, the diarrhea and frequency of bowel movements were predominant issues for Mr. and Mrs. McKinnon, and they discussed them daily.
- Mr. McKinnon kept notes recording daily blood pressure readings during the same time frame.
- The notes commenced on the date Mr. McKinnon was discharged from the hospital (December 16, 2014) and ceased on the date of his cardiac arrest.
- The dates of Mr. McKinnon's appointments with Dr. Cadegan are designated in the notes with an "X". Dr. Cadegan's chart notes indicate that, at these visits, the frequency of bowel movements was discussed and recorded.

- Mrs. McKinnon testified she believed the notes could represent bathroom visits; but, if they were a record of bowel movements it was not complete.

[44] I am satisfied this evidence is sufficient to permit a jury to attribute meaning to the notes. Dr. Cadegan's argument that the jury could find they represent bowel movements did not invite conjecture or speculation. There is evidence from which a jury might reach such a conclusion.

[45] With respect to whether the trial judge should have exercised his residual discretion to exclude the evidence because its prejudicial effect exceeded its probative value, the appellants argue the notes might prejudice their case on the merits if the jury concluded they constituted a record of bowel movements. With respect, this submission is flawed. Assessing the potential prejudicial effect of evidence involves considering trial fairness and not whether the merits of a party's case might be negatively affected.

[46] The Manitoba Court of Appeal in *R. v. Hall*, 2018 MBCA 122, described some of the prejudicial dangers to be weighed against probative value:

> [127] Prejudicial effect is assessed by identifying the dangers of the evidence and **considering how real those dangers are to the fairness of the trial** (see *Hart* at para 106). **Prejudice, however, does not refer to the mere fact that the evidence supports the moving party's case to the prejudice of the respondent** (see *R v Tran*, 2001 NSCA 2 at para 28; *R v Fattah*, 2007 ABCA 400 at para 23; and *R v Korski* (CT), 2009 MBCA 37 at para 66).
>
> [128] **Some of the dangers otherwise admissible evidence may cause to the fairness of a trial are undue arousal of the jury's emotions, distraction, unnecessary delay or repetition, unfair surprise to a party and usurpation of the role of the jury** (see *R v Clarke* (1998), 129 CCC (3d) 1 at paras 34-45 (Ont CA); and *R v Candir*, 2009 ONCA 915 at paras 59-61, leave to appeal to SCC refused, 34622 (26 April 2012)).
>
> [emphasis added]

[47] There was no argument by the plaintiffs that there was any risk to trial fairness resulting from the admission of Mr. McKinnon's notes. Their concern was that the strength of their case might be diminished.

[48] The balancing of probative value and prejudice is a discretionary cost/benefit analysis. A trial judge's conclusion on this issue is entitled to significant deference (*R. v. Bridgman*, 2017 ONCA 940 at para. 38; *Schneider* at

para. 91). In his admissibility decision, the trial judge concluded the probative value of the notes exceeded any potential prejudice. I see no basis on which this Court can interfere with that conclusion.

[49] In sum, the notes should have been treated as an admission, a common law hearsay exception. They were made by an adverse party and logically relevant to a live issue.

[50] In their facta, both parties focussed on the trial judge's application of the principled exception from *Khelawon* . They only addressed the admission question after it was raised by the panel. In light of the extent of the submissions on the issue, I will also consider the trial judge's application of the principled exception.

[51] There is no doubt that the requirement for necessity is established by the death of Mr. McKinnon.

[52] With respect to threshold reliability, the contextual evidence which I outlined in relation to whether the notes constituted an admission, also provides support for the analysis. The primary question for consideration in relation to threshold reliability is the potential impact of the inability to cross-examine the author of the notes. In this case, the notes could be cross-referenced against chart entries for three visits with Dr. Cadegan, and Mrs. McKinnon was questioned about her husband's note taking practices as well as their ongoing discussions concerning the state of his health and frequency of his bowel movements. In my view, this additional evidence mitigates any concerns about the inability to cross-examine Mr. McKinnon.

[53] The trial judge identified the correct legal principles from *Khelawon* and made evidentiary findings, which are owed deference. I am satisfied that the analysis with respect to the principled exception was properly carried out and there is no basis for appellate interference.

[54] I would dismiss this ground of appeal.

> *Issue 2 – Did the trial judge err in law by improperly and inadequately instructing the jury on the weight and scope to be afforded to the hearsay evidence?*

[55] In a trial with a judge and jury there is a clear demarcation between the role of the trial judge, who is responsible for determining questions of law and the admissibility of evidence, and the jury, which must apply the law and make

findings of fact. The trial judge is also responsible for providing instructions to the jury on questions of law and giving them guidance in relation to the matters which they must decide.

[56] Juries do not provide reasons for their decisions and, as a result, challenges to jury verdicts will usually focus on decisions made by the trial judge and the adequacy of the jury's instructions. In this case, the appellants allege that the trial judge's instructions in relation to the handwritten notes were deficient.

[57] Before embarking on a consideration of the sufficiency of the jury instructions, I will review the applicable principles for appellate review.

[58] The governing principles were set out by Watt, J.A. in *R. v. S.(J.)*, 2012 ONCA 684:

> [34] Several well-established principles inform and guide our decision in connection with this ground of appeal.
>
> [35] First, a trial judge presiding in a jury trial is required, except in cases where it would be needless to do so, to review the substantial parts of the evidence and give the jury the position of the defence, so that, in the end, the jury can appreciate the value and effect of that evidence: *Azoulay v. R.*, [1952] 2 S.C.R. 495, at pp. 497-498; *R. v. MacKinnon* (1999), 43 O.R. (3d) 378 (Ont. C.A.), at p. 385. Proper instructions leave the jury with a sufficient understanding of the facts as those facts relate to the issues the jury has to decide: *R. v. Jacquard*, [1997] 1 S.C.R. 314 (S.C.C.), at para. 14; *R. v. Cooper*, [1993] 1 S.C.R. 146 (S.C.C.), at p.163.
>
> [36] Second, we test the adequacy of jury instructions against their ability to fulfill the purpose for which instructions are provided. We do not test them to determine whether or to what extent they adhere to or depart from some particular approach or specific formula: *Jacquard*, at para. 62; *MacKinnon*, at p. 386. In the end, the jury must understand:
>
> i. the factual issues to be determined;
>
> ii. the legal principles applicable to the issues and the evidence adduced at trial;
>
> iii. the positions of the parties; and
>
> iv. the substantial parts of the evidence relevant to the positions of the parties on the issues to be decided.
>
> [37] Third, it is the substance, not the form of final instructions that determines whether those instructions have satisfied or fallen short of what we require of them. Yet a sound, organized approach to those instructions is more likely to produce a satisfactory and legally sustainable result: *MacKinnon*, at p. 386.

> [38] Fourth, a trial judge frequently relates the evidence relevant to the positions of the parties on the controversial issues by reviewing the substance of the evidence that bears upon each issue and indicating to the jury what parts of the evidence may support each party's position. Describing the substance of the evidence does not require a regurgitation of every syllable spoken by any or every witness. Rather, it calls for a measured approach that pares to the evidentiary core of the case, for and against, on the issue under discussion: *MacKinnon*, at pp. 386-387. Evidence reviewed once need not be reviewed twice, provided the instructions make it clear that the same evidence may be of service in the resolution of more than one issue: *Jacquard*, at para. 14.
>
> [39] Fifth, the closing address of counsel does not relieve the trial judge of the obligation to ensure that the jury is aware of the substance and understands the significance of the evidence to the critical issues in the case. However, a trial judge can take into account the closing addresses of counsel in deciding how to discharge his or her obligation to review and relate the evidence to the relevant issues. A trial judge may refer to, or incorporate by reference, counsel's submissions to assist in relating the evidence to the positions of the parties on the issues in controversy: *MacKinnon*, at p. 387.
>
> [40] Finally, where counsel receive a copy of the proposed final instructions in advance of delivery, are invited to make submissions about errors and omissions, but voice none and acquiesce in what will be said, the failure to object must be accorded considerable weight when it is later said that the instructions have failed to adequately and fairly present the position of the appellant: *R. v. Polimac*, 2010 ONCA 346, 254 C.C.C. (3d) 359 (Ont. C.A.), at paras. 89, 96-97. On the other hand, where the cumulative effect of several errors is to deprive an appellant of a fair trial, the failure of trial counsel to object is not determinative on appeal.

[59] In order to assess the sufficiency of a jury charge, the alleged errors must be examined in the context of the entire trial proceeding. The Manitoba Court of Appeal in *R. v. Herntier*, 2020 MBCA 95, described it this way:

> [281] Because the alleged errors must be examined 'in the context of the entire charge and of the trial as a whole' (*R v Jaw*, 2009 SCC 42 at para 32), appellate review encompasses the evidence, the live issues, the positions of the parties and the submissions of counsel. (See *R v Daley*, 2007 SCC 53 at para 58; *Jaw* at para 37; *Stubbs* at para 137; *Hall* at para 143; and *Cabrera* at para 19.)

[60] Support for such a broad approach can also be found in *R. v. Daley*, 2007 SCC 53:

> [58] Finally, it should be recalled that the charge to the jury takes place not in isolation, but in the context of the trial as a whole. Appellate review of the trial judge's charge will encompass the addresses of counsel as they may fill gaps left in the charge: see Der, at p. 14-26. Furthermore, it is expected of counsel that

> they will assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: 'In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection.'

[61] When a trial judge admits hearsay evidence for the truth of its contents, there is an obligation to provide meaningful instructions to the jury about this evidence and how it may be used. The Ontario Court of Appeal in *R. v. Pasqualino*, 2008 ONCA 554, described it this way:

> [62] This court has also held that with regard to hearsay evidence admitted for the purpose of proving the truth of its contents under the principled exception, the **trial judge's jury instructions must explain the increased risk that such statements may be unreliable, as well as the jury's obligation to determine the reliability and weight it will attribute to such evidence**: see *R. v. Blackman* (2006), 215 C.C.C. (3d) 524 at para. 85, aff'd 2008 SCC 37; *R. v. Warner* (1994), 94 C.C.C. (3d) 540 at 551; *R. v. A.(S.)* (1992), 76 C.C.C. (3d) 522 at 527–29. In *Blackman*, Justice Cronk stated, at para. 85, that instructions concerning hearsay admitted under the principled exception are adequate so long as they make clear to the jury 'the need to determine whether the [s]tatements were made and, if made, the nature of their contents, as well as the imperative to evaluate the evidence of the [s]tatements carefully and in the light of all the other evidence at trial.'
>
> [emphasis added]

[62] With these principles in mind, I will assess the trial judge's instructions with respect to the written notes, which were admitted as an exception to the hearsay rule.

[63] The first time the trial judge referred to the notes in the presence of the jury was in his final instructions. Although he provided a generic mid-trial instruction describing hearsay evidence at the close of the plaintiffs' case, he did not identify any evidence which might fall within its ambit. This mid-trial instruction provided no useful information to the jury in relation to the handwritten notes or what they might be able to do with them.

[64] In closing submissions, the defence presented their arguments first since they had called evidence. Counsel made multiple references to the notes, which they described as a "chart" or "record" prepared by Mr. McKinnon of his bowel

movements. They argued that some of these notes matched the information that Dr. Cadegan had recorded in his chart during visits with Mr. McKinnon. The defence said that the notes showed a reduction in bowel movements to the extent that by mid-January Mr. McKinnon was experiencing a normal frequency of movements, and his diarrhea was subsiding.

[65] In his concluding remarks, defence counsel described the notes as "very powerful" records to which the jury should give "appropriate weight".

[66] In her closing submissions, counsel for the plaintiffs said the following with respect to the notes:

> Now with respect to interpretation of the evidence, we believe that Mr. Hayne speaking on behalf of the Defendant this morning has mischaracterized much of the evidence as it was recounted to you. And there are some pieces of that evidence that we wish to address before we get into our planned remarks.
>
> Ultimately, these are issues for you, the jury, to sort out for yourselves. But as you do that, I felt it important to address the following items. First, this idea of bowel movement chart that you have been presented that was done by Leroy McKinnon. This has been presented by Mr. Hayne as unequivocal evidence, and I would like to remind you that it is not. There are no words, no context, no labelling provided in the documents that you have before you. Maureen McKinnon was the only party that was able to give any direct evidence as to what these notes could or could not be because Leroy McKinnon is unfortunately [un]available to do that. Maureen's evidence was that she found these pages loose. They were not bundled together. She does not know with any certainty what these documents are because Leroy did not tell her about them.
>
> Remember, you don't actually know what these notes mean. But you've heard Mrs. McKinnon's sworn evidence that if they are a listing of Leroy McKinnon's bowel movements, it is not a comprehensive list. And even if you accept that, every single movement on that list was diarrhea. Mrs. McKinnon's evidence was that that did not stop until the day that Leroy McKinnon's heart did.

[67] The trial judge's instructions with respect to the notes were sparse. He told the jury they had been presented by the defendant as a record of bathroom visits by Mr. McKinnon, but that it was for the jury "to decide". He said it was up to them to determine the weight, if any, to be given to the notes in the context of the rest of the evidence. He made no mention of concerns with respect to the reliability of the notes nor any evidence which might impact on this. For example, Mrs. McKinnon testified that if the notes were a record of Mr. McKinnon's bowel movements, they had to be incomplete because there was not a single day when he had only one movement, despite the notes indicating otherwise.

[68] The trial judge did not, contrary to the guidance from the Ontario Court of Appeal in *Pasqualino*, instruct the jury that they must consider both the reliability of the notes and the weight to be given to them. Although the trial judge must consider threshold reliability as part of his analysis, the issue of ultimate reliability is left to the jury as trier of fact (*R. v. Blackman*, 2008 SCC 37 at para. 56; *R. v. Bradshaw*, 2017 SCC 35 at paras. 41-2; *Nurse* at para. 92).

[69] The trial judge did mention that the jury needs to determine the weight of the notes in the context of all the evidence. However, he did not tell them they must consider their reliability. In fact, his instructions suggest he had decided the issue of both necessity and reliability, which implied the jury need not consider that question. The trial judge was obviously referring to his determination of threshold reliability; however, the jury would not be expected to understand the distinction between this and ultimate reliability, which fell to them to decide.

[70] In my view, this instruction was not only inadequate, but also potentially misleading to the jury because it appears to divest them of their responsibility to consider the reliability of the notes. Nothing in the submissions of counsel ameliorates this error. The jury needed to know that it was entirely up to them to determine if the notes were reliable and whether they could be used or ignored in reaching their verdict. The trial judge's comment that he had determined the notes to be reliable and necessary created the risk that the jury might misunderstand they were the ultimate judges of that question.

[71] Neither counsel objected to the jury instructions concerning the notes. Although that omission can be considered in evaluating the adequacy of the instructions, it is not determinative. The content of the instructions is ultimately the responsibility of the trial judge (*R. v. Kelsey*, 2017 NSCA 89 at para. 91-4).

[72] Given the emphasis defence counsel put on the notes during the trial, including in their closing submissions, the trial judge's failure to provide proper instructions on this issue was serious. Defence counsel told the jury the factual assumption made by the plaintiffs' causation expert that Mr. McKinnon's severe diarrhea continued until his death was contradicted by the "record" of bowel movements contained in his notes. As a result, they said the expert opinion was "fundamentally flawed". It is important to note the jury found in favour of the defence on the issue of causation.

[73] I am satisfied the error in the jury instructions justifies setting aside the verdict and ordering a new trial.

Issue 3 – Did the trial judge err in law by preventing the jury from hearing and interpreting evidence in response to a question posed during their deliberations?

[74] In light of my conclusion with respect to the deficiencies in the trial judge's jury instructions, I need not address the sufficiency of the manner in which the jury's question was answered in any detail.

[75] I am satisfied the process followed by the trial judge of consulting with counsel and reviewing Mrs. McKinnon's testimony with them was entirely correct. His conclusion that she did not say Dr. Cadegan was told her husband was not eating is factually accurate. The response given to the jury was appropriate and does not warrant appellate intervention.

Disposition

[76] The trial judge properly admitted Mr. McKinnon's notes; although, he ought to have addressed their admissibility as an admission by a party as the first step in his analysis. If he had done so, he would have reached the same conclusion as he did using the *Khelawon* approach and admitted them in evidence.

[77] Once the notes were admitted, the trial judge needed to explain to the jury the frailties of this hearsay evidence, how they should assess its reliability, and the weight, if any, to be given to it. Instead, he potentially misled them by suggesting he had already determined the question of reliability. The submissions of counsel did not mitigate the problem.

[78] The notes were of great significance to the defence theory of the case, and any confusion on the part of the jury about what they could do with this evidence created a risk that they may not properly carry out their task of assessing the evidence and arriving at the necessary findings of fact. In the circumstances of this case, that risk requires the verdict to be set aside and a new trial ordered.

[79] The appellants are entitled to costs; however, in oral submissions they indicated these should be limited to disbursements only. They did not request party and party costs of the appeal. I would allow the appeal, set aside the order for trial costs, and order the respondent to pay the appellants' reasonable disbursements of the appeal. The costs of the original trial and any retrial shall be at the discretion of the judge presiding over the new trial.

Wood, C.J.N.S.

Concurred in:

Farrar, J.A.

Derrick, J.A.