SUPREME COURT OF NOVA SCOTIA

Citation: *Downey v. McNeely*, 2014 NSSC 457

Date: 20141223
Docket: Hfx No. 289029
Registry: Halifax

Between:

Thomas Valentine Downey

Plaintiff

v.

Dr. Patrice Daniel McNeely

Defendant

Judge: The Honourable Justice M. Heather Robertson

Written Submissions: October 14 and 17, 2014 (**Motion re Striking a Portion of Expert Report**)

Written Release: January 29, 2015 (**Orally: December 23, 2014**)

Counsel: Colin D. Bryson, Q.C., for the plaintiff
Thomas P. Donovan, Q.C., and Joseph M. Herschorn, for the defendant

Robertson, J.: (Orally)

[1] The parties seek an advance ruling on an issue of expert evidence.

[2] Dr. Patrice Daniel McNeely, a neurosurgeon, performed a spinal laminectomy on the plaintiff, Thomas Downey, in 2005.

[3] Mr. Downey alleges that Dr. McNeely failed to obtain his informed consent and that the material risks were not appropriately explained to him.

[4] Causation will be an issue at trial.

[5] Relying on *Reibl v. Hughes*, [1980] 2 S.C.R. 880, the defendant says the plaintiff must not only show that the physician failed to explain the material risks of the laminectomy procedure but also that this failure caused the alleged harm he seeks to be compensated for. The plaintiff must show that a reasonable person in his circumstances would not have consented to and undergone the procedure if fully informed of the risks.

[6] The defendant has filed an export report in support of Dr. McNeely. Dr. Mark Hamilton, will if qualified as an expert before the court, testify that in his opinion Dr. McNeely met the standard of care for obtaining consent by properly explaining the material risks. Dr. Hamilton stated in his report:

> Furthermore, in my experience, patients with symptomatic tethered spinal cord usually wish to undertake surgery even when made aware of these risks.

[7] Plaintiff's counsel objects to this statement, relying on *R. v. Abbey* 2009 ONCA 624, urging the court not to allow the expert evidence to distort the fact finding process be accepted by the jury as being virtually infallible or having more weight than it deserves.

[8] The plaintiff says the question of whether a reasonable person in the plaintiff's circumstances would have declined the procedure if fully informed of the risks is a matter the jury can form their own conclusions about without help, making Dr. Hamilton's statement unnecessary. He urges the court to apply the criteria of relevance and necessity strictly, and to exclude Dr. Hamilton's evidence on this point.

[9] The plaintiff also recommends that court use the gatekeeper function described in *R. v. Wilson* (2002), 166 C.C.C. (3d) 294 (Ont. Sup. Ct.J.), at paras. 87-90. In addition the plaintiff makes the following arguments about the statement:

a) It is not properly the subject of expert opinion evidence, one of the yes/no criteria that must be met in the first stage of the *Abbey* approach to the *Mohan* analysis.

b) The report provides absolutely no background on the group of patients that Dr. Hamilton refers to that "usually wish to undertake the surgery". The

> question for the jury is a subjective/objective question, asking the jury to put themselves in Mr. Downey's shoes, with his pain, his history, etc. We have no idea whether Mr. Downey's circumstances are in any way comparable to the individual experiences of the people in the group that Dr. Hamilton refers to. We have no idea what explanations about the surgery were given to those patients. Dr. Hamilton's statement is, putting it mildly, a very unscientific, non-rigorous statistical analysis. Because of that, it does not pass even the relaxed reliability test for non-scientific experts permitted in *Abbey*, and thus like the evidence in *Mohan*, is not helpful or necessary.
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> c) There is the unchecked danger that a jury faced with such an opinion may abdicate its fact-finding role on the assumption that Dr. Hamilton, because of his expertise, knows more about the reasonable patient than the jury does.

[10] Lastly, the plaintiff says the statement is not in compliance with Rule 55.04(2).

[11] The plaintiff urges the court to view Dr. Hamilton's statement as an informal survey and an unsubstantial opinion.

[12] In my view, Dr. Hamilton's statement is not expert opinion. It is experiential evidence based on Dr. Hamilton's observation from years of practice. Notwithstanding that Dr. Hamilton is a neurosurgeon who will testify as an expert, this statement more properly falls into the category of "lay opinion" and is admissible.

[13] The real issue will be the assessment and weight to be given to the evidence after it is admitted.

[14] In *The Law of Evidence in Canada*, 4th edn. (LexisNexis, 2014), the Modern Statement of Lay Opinion Rule: "Helpfulness" is described at §12.9 – §12.12:

> §12.9 Finally, Dickson J. (as he then was) in *R. v. Graat* all but did away with the illogical distinction between so-called fact and opinion where the witness' testimony was founded on personal knowledge. He pointed out the numerous exceptions to the opinion rule that had developed and concluded:
>
> > Except for the sake of convenience, there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.
>
> §12.10 Returning to broad principles, Dickson J. put the admissibility of such evidence on a sound and straightforward basis:
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> > The witnesses had an opportunity for personal observation. They were in a position to give the Court real help.
>
> §12.11 Prior to the *Graat* decision, the trial judge would simply stop the witness if he or she began to answer in the form of an opinion and the judge would then determine whether the proffered testimony would be necessary for the trier of fact. Justice Dickson held that lay persons may testify about their observations where the witness is "merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly". Thus, the law moved away from the requirement of "necessity" in the case of lay witnesses whereby opinion evidence was received only if the witness could not "owing to the nature of the matter adequately convey to the jury the data from which such inference is made to a "helpfulness" standard.
>
> §12.12 Couched in these terms, the modern opinion rule for lay witnesses should pose few exclusionary difficulties when based on the witness' perceptions. The real issue will be the assessment and weight to be given to such evidence after it is admitted.

and at §12.14:

> §12.14 Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about. But as such evidence approaches the central issues that the courts must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops.

[15] I am also of the view that Rule 55.04(2)(b) does not apply to this statement and it would not be necessary for Dr. Hamilton to set material facts (perhaps a recital of each case he has seen where a patient did consent to the laminectomy procedure) to support his statement. Rather he will make a professional observation in a compendious mode of speaking.

[16] His observations are legitimate, and probative evidence relevant to the issue of what a reasonable person informed of the risks would do. The jury must decide causation and in doing so may reasonably ask themselves what a typical patient would decide.

[17] Such evidence has been accepted by the courts. The defendant has cited in their brief various instances:

> In *Rayner v. Knickle* (1992), 99 Nfld. & P.E.I.R 35 (PEICA), the trial judge heard evidence that the expert had never seen a patient refuse an

amniocentesis test for c-section delivery. In the circumstances of that case, the PEI Court of Appeal stated that this was evidence that had to be taken into account in analyzing causation (pp. 37-8).

In *Brandon v. Jordan*, [2001] B.C.J. No 308, the Court considered evidence that only 2% to 5% of patients declined laparoscopic tubal ligation when informed of the risks (p. 44).

In *Perez v. Ziesmann,* 2005 MBQB 157, experts testified that they had never seen a patient decline the nipple-inversion procedure in issue because of the risk of nipple loss (para. 34).

In *Grisack v. Fainman*, [1999] O.J. No. 3174, an expert testified that 1% or less of his patients did not proceed with intravascular injection for neck problems (para. 103).

In *Flodell v. Hesson Estate,* [2000] A.J. No. 1220, an expert testified that in his 12 years of experience, only one patient had declined the epidural procedure in question (para.17).

[18] The defendant also cites *Schanilec Estate v. Harris* (1987), 36 D.L.R. 4th 410, a decision of the British Columbia Court of Appeal, a similar case where the

plaintiff underwent a spinal laminectomy. The court addressed the special circumstance listed by the trial judge that modified the objective analysis of the issue of informed consent. The court found the evidence of other neurosurgeons to be relevant at para. 21:

> Other relevant considerations for a reasonable man in the plaintiff's position viewing the case objectively would be (1) the fact that all the neurosurgeons who testified at the trial stated that they had never known a patient suffering from moderately severe symptoms of cervical degeneration to refuse to have the operation which was performed in this case and, (2) the fact that the risk of paralysis, although material, was remote.

[19] Other Nova Scotia authorities cited include: *Crocker v. Awan,* 2002 NSSC 136; *Locke v. Lea*. [1997] N.S.J. No. 186.

[20] I find the final sentence in Dr. Hamilton's report to be admissible as lay opinion, subject to Dr. Hamilton being qualified as an expert at trial and his report being otherwise admissible.

Justice M. Heather Robertson