

SUPREME COURT OF NOVA SCOTIA

Citation: Anderson v. Queen Elizabeth II Health Sciences Centre,
2011 NSSC 226

Date: 20110608

Docket: Hfx. No. 155158

Registry: Halifax

Between:

Victoria Renata Anderson, Mildred Anderson
and Victor Anderson

Plaintiffs

v.

The Queen Elizabeth II Health Sciences Centre,
Dr. S.A. Gee, and Dr. S. Sharma

Defendants

DECISION

(Pre-trial Motion to exclude evidence of Dr. Michael Freeman)

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: May 5, 2011

Written Decision: June 8, 2011

Counsel: Raymond F. Wagner and Michael Dull for the Plaintiffs
Daniel M. Campbell, Q.C. and W. Harry Thurlow for the
Defendants

By the Court:

[1] On May 5, 2011, this Court heard a Motion brought by the Defendants, Drs. Gee and Sharma, seeking to have the proposed opinion of one of the Plaintiffs' experts, Dr. Michael Freeman, ruled inadmissible. As the trial was scheduled to commence on May 24, 2011 (which has been subsequently adjourned for reasons unrelated to this motion), the parties were advised that the Court would communicate the outcome of the motion to them in short order, so as to not unduly delay trial preparation, with substantive reasons to follow. These are the reasons supporting the Court's determination to dismiss the Defendants' motion for exclusion.

BACKGROUND

[2] In their written submissions, the parties have outlined the nature of the claim before the Court. The Plaintiff Victoria Anderson has commenced an action against the Defendants, in relation to alleged acts of medical negligence which occurred in April of 1997. It is asserted that said acts caused serious consequences to Ms. Anderson, resulting in her being "locked in", essentially becoming completely paralyzed other than retaining the ability to voluntarily move her eyes.

There will be substantial expert evidence called at trial by both the Plaintiffs and Defendants. It appears to be agreed that causation is the most substantial issue in dispute between the parties, which will be an issue surrounding which expert evidence will be adduced by both sides.

[3] From the written and oral submissions of Counsel, there appears to be three competing theories associated with the causation of the Plaintiff's tragic circumstances. Although undoubtedly these will be explained in greater detail at trial, simplistically for the purposes of the present matter, these can be described as follows: the actions of the Defendants caused the resulting condition in conjunction with an attempted central venous line placement; the earlier actions of other medical personnel caused the resulting condition due to a similar attempted procedure; or the Plaintiff's condition spontaneously occurred. The Defendants acknowledge that any three of the above are possible causes of the Plaintiff's resulting condition.

THE CONTESTED EXPERT EVIDENCE

[4] The expert report in question appears to have been prepared at the request of Plaintiffs' Counsel by Dr. Michael Freeman. It is dated August 23, 2010, and is 13 pages in length. It was provided to the Defendants in early September, 2010. It offers a brief explanation as to the nature of Epidemiology as a field of scientific study and the author's qualifications. The report proceeds further to outline the material reviewed in terms of the present matter, the methodology applied, and the outcome of his "causation analysis". In conclusion, Dr. Freeman expresses an opinion as to the "most probable cause of Victoria Anderson's stroke", including a percentage of probability.

THE DEFENDANTS' POSITION

[5] As a preliminary observation, the Defendants in bringing this motion to exclude, are not doing so on a procedural basis contained either in current Civil Procedure Rule 51, nor former Rule 31.08. Additionally, it should be noted that the qualifications of Dr. Freeman, to provide opinion evidence in the realm of epidemiology, is not being challenged. Here, the Defendants assert that the use of epidemiological evidence in the context of the present case **at all** is inappropriate, and should be deemed inadmissible.

[6] The Defendants do not argue that epidemiological evidence has no role in some matters before the Court. It is asserted however, that given that there are three possible theories of causation identified, that the nature of evidence being pro-offered by Dr. Freeman, namely, looking at the relative probabilities of these theories, is not a proper, nor recognized usage of epidemiological evidence. The Court is cautioned against permitting the usage of epidemiological evidence in this novel type of situation. It is further argued that Dr. Freeman has failed to "connect" his stated opinion to the factual underpinnings of this case, and as such, it should be found inadmissible.

[7] The Defendants further argue that Dr. Freeman, in expressing his opinion on the probability of the causal theories, is attempting to remove the determination of causation from the trial judge. This is clearly not appropriate, and it is submitted, should lead to the exclusion of the opinion, as it usurps the Court's function of determining a central issue. It is asserted that in particular, the report in question fails to meet two of the requirements for the admission of expert evidence as established in **R. v. Mohan**, [1994] 2 S.C.R. 9, relevance and necessity.

[8] The Court has been provided by the Defendants with a number of case authorities in support of their position that the Freeman report does not meet the required threshold reliability and necessity for its admission at trial. One decision, **Taylor v. Liong**, 2007 BCSC 231 is an excellent example of the process and considerations to be undertaken when challenging the admission of expert evidence. There, the challenge was undertaken by way of *voir dire*, with the trial judge clearly having the benefit of referencing evidence of the various experts, and scientific studies which address reliability concerns.

[9] In the present instance, the Court has received the Freeman report, and the oral and written submissions of Counsel. In addition, the Defendants, in the course of their oral submissions provided the Court with a single scientific study, asserting it served to undermine the opinion of Dr. Freeman.

THE PLAINTIFFS' POSITION

[10] The Plaintiffs assert that there is nothing unusual nor novel, about the use of epidemiological evidence in the context of the present case, and there is no support in the case authorities or elsewhere, for the Defendants' view that such evidence

cannot be utilized to look at the relative probabilities between competing possible theories of causation.

[11] The Plaintiffs argue that the case law contains many examples of such evidence being admitted at trial to assist the trier of fact in reaching conclusions relating to causation. There is nothing about the expert opinion being offered which takes away from this Court's ultimate responsibility to make a determination regarding the cause of the Plaintiffs' circumstances. The opinion of Dr. Freeman is only one aspect of the evidence which will be before the Court at trial, which the Court will, in reaching its ultimate determination, consider and assign varying degrees of weight, including none at all.

[12] The Plaintiffs assert that the opinion being offered by Dr. Freeman is clearly relevant to the issues before the Court, and given the nature of the complex medical issues which will be part of the Court's consideration, it is necessary. The opinion being offered does not infringe, in any way, the principles enunciated in **Mohan, supra**.

DETERMINATION

[13] The starting point for any consideration of expert evidence, must begin with **Mohan, supra**. There, the Supreme Court of Canada confirmed the modern approach to the admissibility of expert evidence, which has entrenched itself in subsequent decisions since 1994. The following oft-quoted passage appears at paragraph 17 the decision:

17 Admission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.

[14] As noted earlier, the Defendants in the present instance, take objection with respect to only the aspects of relevance and necessity. In terms of the relevancy requirement, Sopinka, J. states:

18 Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as a question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See **McCormick on Evidence** (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of

its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

[15] The Court gives further valuable guidance with respect to the requirement of necessity, and how such should be considered in paragraphs 21 through 23 as follows:

21. In *R. v. Abbey*, *supra*, Dickson, J., as he then was, stated, at p. 42:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (**Turner** (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)

22. This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson, J. in *R. v. Abbey, supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from **Beven on Negligence** (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". More recently, in *R. v. Lavallee, supra*, the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

23. As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in *R. v. Turner*, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699, at p. 718:

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific

qualifications does not be that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.

Is the proposed evidence relevant?

[16] I am satisfied that the epidemiological opinion contained in Dr. Freeman's report meets the threshold reliability required by **Mohan, supra**. The proffered evidence will address the likelihood of various theories of causation being advanced during the course of the trial. As I understand it, evidence from a variety of other experts will be called in support of one of the three possible sources of causation.

[17] The Court has been presented with a number of case authorities by both sides, which demonstrate the use of epidemiological evidence at trial, and in particular in relation to the ultimate determination of causation. (See **Dickson v. Pinder**, 2010 ABQB 269; **Malinowski v. Schneider**, 2010 ABQB 734; **Taylor v.**

Liong, supra.) Although the decisions vary with respect to the weight ultimately afforded to the epidemiological evidence by the trier of fact, it has been, in all those authorities presented to the Court, considered to at least to meet threshold reliability. Further, it does not appear, in those same instances, that such opinion evidence was viewed as infringing upon the ultimate role of the trier of fact.

[18] In the present instance, the Court does not view the proposed usage of Dr. Freeman's evidence as being a novel utilization of epidemiological evidence. Nor, by its admission, will the Court's role as the ultimate decision maker regarding causation, be usurped. The expert opinion will be only one facet of the evidence relating to causation, and its ultimate weight will only be determined at the end of trial, and after appropriate challenge by the Defendants. The Court is mindful of the Defendants' submission that the opinion of Dr. Freeman lacks a factual "connection" to the issues at hand. In my view, such is a difficult proposition to support or reject, when the evidence has yet to be heard, and the facts determined. The Defendants will be entitled to fully explore the strength of this proposition at trial, and again, such may have an impact on the ultimate weight afforded to the evidence.

Is the proposed evidence necessary?

[19] The Defendants submit that epidemiological evidence in the context of this case is not necessary, as the three identified potential causes of Ms. Anderson's condition, are all possible. It is asserted that such evidence only becomes necessary where one or more possible theories of causation are being asserted as being impossible, or highly improbable.

[20] Again, both parties have presented the Court with cases where epidemiological evidence was admitted at trial. Many of these are recent decisions, certainly post-**Mohan**, where necessity would be an essential consideration to be employed in the course of the trial judge's "gatekeeping" function. In all instances, the expert evidence appears to have been admitted, and thus viewed as "necessary", at least for this threshold determination.

[21] There are three possible theories of causation. The Plaintiffs assert that the epidemiological evidence may provide assistance in assessing the relative probabilities of those respective theories. I am satisfied that this Court does not possess the requisite knowledge to properly consider the theories of causation

being advanced, and to fully consider the appropriate scientific or statistical aspects thereof, without some assistance. In my view, the nature of the evidence which is sought to be introduced will potentially provide the Court the tools to better understand the other medical evidence, and in particular how such relates to the theories of causation. I see no support in the authorities for the Defendants' submission that such evidence should only be considered as necessary where it serves to eliminate a possible source of causation, as opposed to addressing the differing probabilities between two or more possible causes.

CONCLUSION

[22] As noted above, it is this Court's view that the opinion evidence of Dr. Freeman has met the threshold for reliability and necessity as per **Mohan, supra**. The Plaintiffs are accordingly entitled to introduce said evidence at trial. However, as in all instances where opinion evidence is admitted, the ultimate weight afforded to it will be determined at the end of trial, and after it has undergone the challenge directed at it by the Defendants.

J.