

SUPREME COURT OF NOVA SCOTIA
Citation: *Robicheau v. Prescott*, 2020 NSSC 295

Date: 20201020
Docket: *Hfx* No. 441481
Registry: Halifax

Between:

John Robicheau

Plaintiff

v.

Thomas Prescott

Defendant

Judge: The Honourable Justice Ann E. Smith

Heard: October 15, 2020, in Halifax, Nova Scotia

Counsel: Laura H. Veniot, for the Plaintiff
Karen N. Bennett-Clayton and Sara D. Nicholson, for the
Defendant

By the Court:

Introduction

[1] The Plaintiff in this action moves for an order to exclude from evidence at trial the opinion evidence contained in two reports authored by Dr. Edwin Koshi, physiatrist. The first report is dated May 30, 2014 and the second report (a rebuttal report) is dated January 26, 2019.

[2] The underlining action arises from a motor vehicle accident which occurred on July 23, 2012. The Plaintiff rear-ended the Defendant's vehicle. The Plaintiff claims damages arising from the injuries he alleges he sustained in the accident. I am the trial judge for a Judge and Jury trial scheduled for eight days, beginning January 4, 2021.

[3] Following the accident, at the request of the Plaintiff's disability insurer, the Plaintiff underwent an independent medical examination conducted by Dr. Koshi. Dr. Koshi authored a report dated May 30, 2014.

[4] After the Plaintiff's action was commenced, the Plaintiff disclosed Dr. Koshi's May 30, 2014 IME report in its Affidavit Disclosing Documents.

[5] The Defendant determined to file Dr. Koshi's IME report as a *Rule 55* expert report and did so on September 6, 2018.

[6] The Plaintiff filed the *Rule 55* expert report of Dr. Ross Leighton dated December 11, 2018.

[7] On January 26, 2019, the Defendant filed a rebuttal report prepared by Dr. Koshi.

[8] The Plaintiff objects to the admissibility of Dr. Koshi's May 30, 2014 IME report as well as portions of his January 26, 2019 Rebuttal Report.

Issues

1. Is Dr. Koshi's May 30th IME Report admissible as the Defendant's *Rule 55* report?

2. Is Dr. Koshi's January 2019 Rebuttal Report compliant with the *Rules*?

Background

[9] The Defendant does not contest that in 2014, Dr. Koshi was originally retained by IME Evaluations Ltd. to perform an independent medical examination of the Plaintiff and that that IME was sought with respect to the July 23, 2012 motor vehicle accident, the subject of this proceeding. IME Plus Evaluations Ltd. had been retained by the Plaintiff's disability insurer, La Capitale. Neither IME Plus Evaluations Ltd. nor La Capitale is a party to this action.

[10] The Plaintiff disclosed the IME Report to the Defendant in his Affidavit Disclosing Documents in April 2016.

[11] In the introduction to this IME Report, Dr. Koshi stated:

I agreed to perform this Independent Medical Examination by complying with the Guidelines of Conduct of the American Board of Independent Medical Examiners.

[12] On August 27, 2018, the Defendant's counsel wrote to Dr. Koshi and sought his consent to file his May 30, 2014 report with the Court pursuant to *Civil Procedure Rule 55.04*. Dr. Koshi gave his consent and on September 6, 2018, Dr. Koshi's May 30, 2014 report was filed with the Court. The Notice of Filing of Expert Reports (*Rule 55*) requested that Dr. Koshi be qualified at the trial as an expert in the field of Physical Medicine (Physiatry) and pain management, capable of giving opinion evidence on the subjects of musculoskeletal injuries and chronic pain, their causes, resultant functional limitations, diagnoses, prognoses, treatment and rehabilitation.

[13] Attached to the Notice was an up-to-date *curriculum vitae* of Dr. Koshi and the following Representations to the Court, which were signed by Dr. Koshi:

Representations to the Court

Pursuant to Nova Scotia *Civil Procedure Rule 55.04* and in connection with my report dated May 30, 2014, I represent to the Supreme Court of Nova Scotia as follows:

1. I am providing an objective opinion for the assistance of the Court, even though I was retained by Ling Chang of IME Plus Evaluations Ltd.
2. I am prepared to testify at the trial or hearing, comply with directions of the Court and apply independent judgment when assisting the Court.

3. The report includes everything I regard as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion.
4. I will answer written questions put by parties as soon as possible after the questions are delivered to me.
5. I will notify each party in writing of a change in the opinion, or of a material fact that not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

[emphasis added]

The Position of the Parties

[14] The Plaintiff's counsel argues that it was impossible for Dr. Koshi to represent that he prepared his May 30, 2014 report "for the assistance of the Court" since that report was written before Mr. Robicheau commenced the within action against Mr. Prescott. Plaintiff's counsel points out that the May 30, 2014 report was not prepared in the context of the current litigation or even at the request of one of the parties. Rather, the report was requested by an adjuster at La Capitale, and arranged by a third party service called IME Plus Evaluations Ltd. The adjuster stated that the insurer, La Capitale, needed "to determine if the physical injuries are causing disability at this time." An "intake coordinator" at IME Plus Evaluations wrote to Dr. Koshi on May 22, 2014 to arrange for the assessment. The intake coordinator attached a "Report Template" which said they would require Dr. Koshi to "Utilize in completing your report." Plaintiff's counsel notes that in none of the requesting correspondence is reference made to the requirements for experts' reports outlined in *Rule 55*.

[15] The Plaintiff's counsel says that the "Representations" are intended to be a confirmation to the Court that the report was prepared in contemplation of the requirements established by *Rule 55*. Counsel contends that the expert is verifying that when he conducted his assessment and prepared the report, he contemplated the requirements of the *Rule*, and prepared the report consistent with those requirements. The argument is essentially that the *Rule* should be provided to or made available to the expert before the report is prepared. Only then, says the Plaintiff's counsel, can the Court have any confidence that the nature of the obligations and expectations envisioned by the *Rule* were in the mind of the expert when he prepared his opinion.

[16] The Defendant's counsel says that Dr. Koshi's May 30, 2014 report complies fully with the requirements of *Rule 55*. Counsel points to the requirements for the

admissibility of expert opinion as set out in *Rule 55.04*, which is set out here in its entirety for ease of reference:

Content of Expert's Report

55.04(1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

- (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
- (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
- (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
- (d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;
- (e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:

- (a) details of the steps taken by the expert in formulating or confirming the opinion;
- (b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;
- (c) the degree of certainty with which the expert holds the opinion;
- (d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

- (a) the expert's relevant qualifications, which may be provided in an attached resumé;

- (b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;
- (c) reference to all publications of the expert on the subject of the opinion;
- (d) information on a teste or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

[17] The Defendant’s counsel notes that *Rule* 55.04(1)(a) provides that the expert must provide an objective opinion for the Court “even if” she or he is retained by a party. Counsel notes that the *Rule* does not prescribe who must retain the expert and does not prescribe when the expert must be retained.

Law and Analysis

[18] The general rule is that witnesses testify as to facts while the conclusions or inferences derived from primary facts are the exclusive purview of the trier of fact. Accordingly, opinion evidence is presumptively inadmissible (see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (*White Burgess*) at para. 14). An exception to this rule of presumptive inadmissibility is expert opinion evidence. Qualified persons may express opinions on matters with respect to which the ordinary person is unlikely to appreciate the facts due to their technical nature or to form a correct judgment without the assistance of persons with special knowledge (see *R. v. D.D.*, [2000] 2 S.C.R. 275 (*R. v. D.D.*) at para. 47).

[19] The most recent pronouncement of the Supreme Court of Canada on the admissibility of expert opinion evidence is *White Burgess*. In that case, Cromwell J., writing for the Court, said that the first step for determining admissibility is for the proponent of the evidence to establish the threshold requirement of admissibility. Relevance at this threshold stage refers to logical relevance. Evidence that does not meet these threshold requirements should be excluded. Cromwell J. added that, “I would retain necessity as a threshold requirement.” Necessity includes matters on which the ordinary person is unlikely to appreciate the facts due to their technical nature or to form a correct judgment without the assistance of persons with special knowledge (see *R. v. D.D.* at para. 47).

[20] Expert opinion evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify (see *R. v. Mohan*, [1994] 2 S.C.R. 9).

[21] Cromwell J. in *White Burgess* emphasized that the proposed expert must be both qualified and independent:

... The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another; (see *White* at para. 32)

[emphasis added]

[22] In the motion before the Court, the Plaintiff's counsel has not raised Dr. Koshi's qualifications or alleged that he is biased. The expressed concerns are only those I have previously referred to – the fact that he was retained by La Capitale to complete an independent medical report prior to the commencement of the within litigation and without allegedly having his *Rule 55* obligations in mind when he authored the report.

[23] The threshold for admissibility of expert opinion evidence is not high. Cromwell J. says so in *White Burgess*:

This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his other primary duty to the court.

[emphasis added]

[24] As I see it, the requirements of *Rule 55* help to ensure that the Court, in its gatekeeper role, admits into evidence only opinions from qualified, unbiased experts who testify for the assistance of the Court. The *Rules* also set forth time-lines for the filing of expert evidence to ensure that trial fairness is achieved.

[25] I find that Dr. Koshi's signing of the "Representations to Court" shows that he understands that his primary duty in providing his evidence is to assist the trier of

fact. The fact that he signed the “attestations” some four years after authoring his 2014 report does not change the fact that he prepared an independent medical assessment of the Plaintiff. He did so for a non-party to this litigation. If anything, it could be said that that fact bolsters Dr. Koshi’s independence.

[26] A party’s choice of expert should be respected unless a party objecting to the choice of expert meets the burden of showing that the party’s chosen expert is unreasonable (see *Saccary v. Vonhammerstein*, 2018 NSSC 135 at paras. 11, 13 and 15 and *Howatt v. Chandler*, 2016 NSSC 216 at para. 12).

[27] The Plaintiff has not come anywhere close to demonstrating that the Defendant’s choice of Dr. Koshi was unreasonable. There is no requirement in the *Rules* that Dr. Koshi must perform another examination of the Plaintiff. I agree with the Defendant’s submission that it is within the interests of justice and the purpose of *Civil Procedure Rule* 1.01 for the Defendant in these circumstances to utilize an available report which complies with *Rule* 55.

[28] Dr. Koshi’s Rebuttal Report dated January 26, 2019 was also challenged in the motion materials as going outside of the scope of the *Rules*. During oral submissions of counsel on the motion, Plaintiff’s counsel said that the only content of the Rebuttal Report being challenged was that report’s incorporation of the May 2014 report, should this Court determine that the 2014 report was inadmissible.

[29] I find that Dr. Koshi’s May 2014 Report is admissible. He has provided the necessary attestations to the Court. He has been qualified as an expert in the field of physical medicine (physiatry) many times before the Court.

[30] Dr. Koshi’s January 26, 2019 Rebuttal Report is also admissible. The one exception is the second full paragraph on page 7 of the report which quotes a small section of Dr. Reginal Yabsley’s July 22, 2013 physician’s narrative. The Rebuttal Report is otherwise admissible.

Conclusions

[31] Dr. Koshi’s May 30, 2014 Report is admissible on the trial of this matter, as is Dr. Koshi’s January 26, 2019 Report (with the single exception noted above).

[32] The Defendant is entitled to his costs on the motion. I note that the Plaintiff was successful on another motion brought by the Defendant to have a report authored by Dr. Reginald Yabsley admitted as a physician’s narrative (*Rule* 55.14). I gave an

oral decision on that motion on October 15, 2020. The report was found to constitute a physician's narrative. I directed that one paragraph where Dr. Yabsley opined on causation was to be deleted because it was outside the scope of a physician's narrative.

[33] If the parties cannot agree on costs, the Court will receive written submissions within ten clear days of this decision.

Smith, J.