# SUPREME COURT OF NOVA SCOTIA

**Citation:** *McKinnon v. Cadegan*, 2020 NSSC 400

**Date:** 20201022
**Docket:** Syd. No. 466969
**Registry:** Sydney

**Between:**

The Estate of Leroy McKinnon, Maureen McKinnon, Amy Kent 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

*Plaintiffs*

v.

Perry Kent Cadegan

*Defendant*

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| **Judge:** | The Honourable Justice Patrick J. Murray |
| **Heard:** | October 13, 2020, in Sydney, Nova Scotia |
| **Oral Voir Dire Decision given:** | October 22, 2020 |
| **Counsel:** | Nick Hooper and Lyndsay Jardine for the Plaintiffs<br>Stewart Hayne and Ryan Lebans for the Defendant |

**By the Court:**

## Introduction

[1] What I must decide on this *voir dire* is whether the notes purportedly made by Leroy McKinnon should be admitted as evidence in this trial for the truth of their contents.

[2] The Defendant seeks to have these notes admitted under the principled exception to the hearsay rule and secondly as an admission by a party under the traditional exception.

[3] Leroy McKinnon passed away in January 2015. The events of November and December 2014 and January 2015 have led to this trial with respect to the medical care provided to Leroy McKinnon by Dr. Cadegan.

## Law

[4] I will first address the issue under the principled approach to admission of hearsay evidence, as set out in ***R v. Khelawon***, 2006 S.C.C. 57. The first question is whether it is necessary for the hearsay statement to be received, "necessary" meaning "reasonably necessary". The Court must apply a flexible approach in determining what is reasonably necessary.

[5] A common reason for necessity is that the person who gave the statement, in this case notes, is deceased, and that is the situation in the case of Mr. McKinnon.

[6] In terms of reliability, the principled approach requires the proponent to establish and provide substitute guarantees of reliability of the evidence in the absence of the usual safeguards.

[7] In this case, the concerns are not so much whether the statement is truthful or mistaken, but what the notes themselves represent. They could be anything, say the Plaintiffs. Maureen McKinnon's evidence is that her husband made notes of anything and everything.

[8] The central dangers usually associated with the acceptance of hearsay evidence at trial are: 1) the absence of an oath or solemn affirmation; 2) the inability of the trier of fact to assess demeanour and therefore the credibility of the

person giving the statement (when it was made); and 3) the lack of a contemporaneous cross-examination.

[9] As I have explained, Leroy McKinnon is not able to be present to explain the writings and information which the Defendant proposes to admit for truth of their contents.

[10] I am mindful of the difference between threshold reliability and ultimate reliability. It is the former which must be met under the principled approach to admissibility.

[11] Further, even where the dual requirements are met, there is still a residual discretion to exclude the evidence if the probative value is outweighed by its prejudicial effect.

[12] Under the law therefore, the evidence sought to be admitted must meet what is known as threshold reliability. There must be sufficient indicia of reliability to justify the evidence being admitted and placed before the trier of fact, who will then weigh and consider the evidence with all of the evidence at trial. At that time, the ultimate reliability, often referred to as assessing the weight of the evidence, will be determined by the trier of fact, in this case, a jury in reaching its verdict.

**Positions of the parties**

[13] In this case, the onus is on the Defendant, Dr. Cadegan, to satisfy the Court that the evidence is sufficiently reliable to be placed before the jury on a balance of probabilities. Mr. Hayne, for Dr. Cadegan, submits that, when all of the circumstances are considered the Defendant has met the burden upon him. There is, the Defendant submits, substantial evidence of reliability beginning with the evidence given by Maureen McKinnon at discovery, followed by Interrogatories submitted to her by Defendant's counsel.

[14] Those answers combined with the medical records of Dr. Cadegan, the hospital records (nurse's notes), amply support the notes in question being admitted and placed before the jury for their consideration, submits the Defendant.

[15] The Defendant also submits that the notes of the late Mr. McKinnon correlate with the other evidence before the Court and included as Exhibits in the affidavit of Mr. Lebans. These exhibits include the answers given by Maureen McKinnon and the office chart of Dr. Cadegan. Maureen McKinnon has provided

evidence on the *voir dire* in relation to medication and blood pressure readings as compared to the notes themselves.

[16] I have carefully considered the argument of the Plaintiffs as to why the threshold test for reliability has not been met. Mr. Hooper says these notes “could be” Leroy McKinnon’s recorded information as to his bathroom visits during the relevant time, or they could be virtually anything else. Moreover, even if the notes are what the Defendant alleges, are they consistent and/or accurate. The Plaintiffs say what is known, is that the notes are not labeled. As such, they could be referring to times when Leroy McKinnon attempted to eat, or have a meal, for example. The Plaintiffs argue they are merely a series of dates and times.

[17] The Plaintiffs argue that Maureen McKinnon’s evidence is only that “it is possible” the notes relate to Leroy McKinnon’s bathroom visits, but she is uncertain, as she stated in the Interrogatories. According to her evidence at the *voir dire*, Maureen McKinnon is far from certain and has “no idea” whether these notes of her husband are a record of his bathroom visits.

[18] The Plaintiffs have submitted the affidavit of Ms. Jardine sworn to October 21, 2020. Attached as exhibit “A”, is a true copy of the nursing note recording Leroy McKinnon’s bowel movement at 8:30 a.m. on December 16, 2014. This is contrary, the Plaintiffs say, to what the notes indicate for that day, being the time of 7:30 a.m. This is an example of the unreliability of the notes as indicia of Mr. McKinnon’s visits, the Plaintiffs submit.

[19] Thus, the Plaintiffs say, these notes are unreliable hearsay evidence and should not be placed before the jury. They submit that the notes would be irreparably prejudicial to the Plaintiffs’ case, if admitted and placed before the jury. They submit that admission of the notes would be putting words from the mouth of Leroy McKinnon before the jury when there are no words in these notes to describe them.

**Decision**

[20] I have considered the submissions of counsel, written and oral, the caselaw, and the evidence before me on this *voir dire*, and have concluded as follows:

1. There is no dispute that the notes are those of Leroy McKinnon. His printed name appears on the notes themselves and his wife Maureen McKinnon confirmed the notes are his, and are in his handwriting.

2. It is also clear the notes were made at the times relevant to these allegations, as the dates and years are recorded in them, although there are other dates as well.

3. In the answers to the Interrogatories provided by Maureen McKinnon, the suggestion that the notes recorded bathroom visits originated with her. She was asked the open-ended question, “What is recorded as occurring at the times listed under the dates”? She could have stated anything, but provided the answer she did in response to the questions. Her evidence confirmed a correlation between the notes and certain medication, Olestyr, (December 24, 2014), and a correlation between the blood pressure reading and the date December 1, 2014. The notes possibly confirm a correlation between Dr. Cadegan’s chart visits, the notes for January 13 and 14, in particular.

4. The Defendant submits that the significance of this evidence relates to the core issue in this case, that of prolonged and persistent Diarrhea. In my view, it is of equal importance to the Plaintiffs, as it relates to the core issue in the case. The Defendant has cited numerous indicia of reliability stemming from the notes themselves. It is evident that Mr. McKinnon was keeping records related to his health at the time in question.

   Undoubtedly, Mr. McKinnon considered this of upmost importance. As Maureen McKinnon said, if he was told to stand on his head by his physician, he would readily do it. The main thing that was occurring with Mr. McKinnon during this time was his problem with Diarrhea. This is clearly borne out by the evidence at trial thus far.

5. I am satisfied that the jury are entitled to consider these notes and to weigh them with all the other evidence given at trial. It will be for them as the triers of fact to decide what weight, if any, should be placed on this evidence after hearing from the witnesses, including Maureen McKinnon.

6. In respect of necessity, I am satisfied that this requirement has been met having regard to the circumstances of this case.

7. I also find that the evidence is sufficiently reliable for admission before the trier of fact.

8. I have considered whether to exercise my residual discretion whether to exclude the evidence. I am satisfied it has the potential to be highly probative and would not be outweighed by any prejudicial effect.

9. I have some concern as to whether the notes are an admission of a party, as argued in the alternative by the Defendant. I have therefore, reserved my decision on that issue.

**Conclusion**

[21] In all of the circumstances, I find there is ample support for the notes being what the Defence says they are, and that threshold reliability is established. I do not find it convincing that they "could be anything", as the Plaintiffs claim. In view of all the circumstances, I find that identifying a single apparent inconsistency with the chart, as per the Plaintiffs' submission does not outweigh, what are otherwise, strong indicia of reliability.

Murray, J