

SUPREME COURT OF NOVA SCOTIA
Citation: *McKinnon v. Cadegan*, 2020 NSSC 401

Date: 20201014
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

Judge: The Honourable Justice Patrick J. Murray
Heard: October 13, 2020, in Sydney, Nova Scotia
Oral Motion October 14, 2020
Decision given:
Counsel: Nick Hooper and Lyndsay Jardine for the Plaintiffs
Stewart Hayne and Ryan Lebans for the Defendant

By the Court:

Introduction

[1] The Plaintiffs have filed a motion seeking a declaration that the expert reports filed on behalf of the Defendant, Dr. Cadegan, those of Dr. Charles Bernstein and Dr. Alan Dummond, contravene the *Civil Procedure Rules* and laws of evidence and should be deemed inadmissible prior to the commencement of the trial.

Dr. Charles Bernstein

[2] In their brief the Plaintiffs describe the issue as follows:

Should the portions of the Bernstein's rebuttal report that do not rebut any position of Dr. Etches report, but rather constitute late filed fresh opinion evidence, be ruled inadmissible and redacted?

[3] Dr. Bernstein's report is brief as is that of Dr. Etches. Both appear to have complied with Rule 55.04(2) which requires a concise statement of each of the expert's opinions. Dr. Etches' report consists of 3 pages and Dr. Bernstein's report consist of 2.5 pages.

[4] The relevant *Civil Procedure Rules* are 55.05 and 55.04. Dr. Bernstein has complied with paragraph (a) of Rule 55.05, in that he has signed his report and indicated it is a statement of the representations and information required in an expert's report stating, that he is providing objective opinion, is prepared to testify and follow the directions of the Court, while applying independent judgment.

[5] In respect of Rule 55.05(b), Dr. Bernstein provides the name of Dr. Etches, being the report that Dr. Bernstein, as rebuttal expert, disagrees and the date of Dr. Etches report, being September 26, 2016.

[6] Rule 55.05(c) requires that the rebuttal expert provide a "quotation of the statement of opinion with which the rebuttal expert disagrees".

[7] The Plaintiffs object to the report on this basis, stating this was not done, and therefore, the rebuttal report of Dr. Bernstein is not in compliance with this rule, and is therefore, not in the proper form.

[8] In their motion brief the Plaintiffs' state the requirements of Rule 55 are strict.

24. It should be noted that this Honourable Court has interpreted the quotation requirement strictly, holding that paraphrasing is viewed as "generally non-compliant" with Rule 55.05. Thus, any arguments to the effect that Dr. Etches is being paraphrased – a difficult argument, given the lack of argumentative commonality between the two reports – should still attract a finding that this report is formally non-compliant with Rule 55.05(c).

[9] In *Bruce v. Munro*, 2016 NSSC 341, Justice Rosinski had this to say about the requirements of Rule 55.05(c), which the Plaintiffs allege Dr. Bernstein impugned.

c) "a quotation of the statement of opinion with which the rebuttal expert disagrees" – Dr. McKelvey's report reference no direct quotations from Dr. King's report – rather he paraphrases Dr. King's comments – these reference could be seen to be generally non compliant.

[10] I have indicated that both reports are brief. Dr. Bernstein's refers to Dr. Etches report in his first paragraph on page 1 and again in the first paragraph on page 2. The remainder of his opinion on page 2 is a discussion of his rebuttal opinion. Dr. Bernstein's conclusion is contained on page 3 in the two concluding paragraphs.

[11] In his report Dr. Etches' conclusions are contained in the last paragraph of page 3. These are related to whether Dr. Cadegan administered the correct treatment, and whether he fell below the standard of care expected of a general practitioner. Dr. Bernstein quoted directly from Dr. Etches' report in regard to these two findings.

[12] In short, it is my impression that given the brevity of both of these reports, and the quoted statement of the opinion with which Dr. Bernstein's disagrees, that any non compliance with respect to form is insufficient to require his report to be deemed inadmissible and substantially redacted, as argued by the Plaintiff.

[13] This is not a report similar to that provided in *Bruce*, which contained no direct quotations from the report being rebutted.

[14] The main issue on this motion is with respect of Dr. Bernstein's report, is whether it meets the requirements of Rule 55.05(e) which requires the report to

contain “the rebutted opinion and no further opinion”. Plaintiffs’ counsel have identified this as the “crux” of their objection to Dr. Bernstein’s rebuttal report.

[15] In short, whether Dr. Bernstein’s report meets the substantive requirement of an experts rebuttal report in confining itself to the opinion rebutted and no more than that.

[16] It should be noted that the report in question contains a statement that the rebuttal opinion is strictly confined to the “same subject” as the quoted opinion, in compliance with Rule 55.05(d).

[17] The Plaintiffs’ have cited each paragraph from page 2 of Dr. Bernstein’s report from paragraph 2 to paragraph 6. In addition, the Plaintiffs’ have objected to the two concluding paragraphs on page 3. I will, to some degree, refer to the language and the basis of the objections.

[18] In my view, it is important to consider Dr. Bernstein’s report as a whole, in relation to the report being rebutted, that of Dr. Etches, in order to determine whether the opinion constitutes proper rebuttal expert evidence.

[19] Further, it is important to consider this is still an expert report with all the requirements of Rule 55.04 being engaged. The obligations under that rule include a full and complete explanation of the rebuttal opinion. Rule 55.05 requires that it remain in the same subject area so as not to stray off into other areas of expertise.

[20] In paragraph 2, page 2, the Plaintiffs’ take issue with Dr. Bernstein’s statement that the diagnosis of lymphocytic colitis can be difficult to ascertain and at times, can be overturned on review by a gastrointestinal pathologist.

[21] The Plaintiffs’ further take issue with respect to Dr. Bernstein’s reference in paragraph 3, page 2, to the diagnosis being connected to the microbiological diagnosis of Norovirus, and that Mr. McKinnon may have suffered from “Brainard Diarrhea”.

[22] It is inappropriate, the Plaintiffs’ argue, to introduce a new diagnosis or misdiagnosis in a rebuttal report. This constitutes new or further opinion and strays outside the bounds of the initial opinion of Dr. Etches, the Plaintiffs say. It is therefore, contrary to Rule 55.05(e) and improper content for rebuttal.

[23] Specifically, the Plaintiffs’ refer to the introduction of “a syndrome of viral gastroenteritis as associated with lymphocytic colitis,” thereby rendering the

treatment accidentally correct, given Dr. Bernstein's statement that this syndrome resolves without specific therapy.

[24] The Plaintiffs' submit there is no mention of these diagnosis' in Dr. Etches' opinion. The opinion of Dr. Bernstein therefore, strays outside and beyond that of rebuttal contrary to the rules stating, if Dr. Cadegan wished to introduce and rely on this opinion, he ought to have provided it much sooner under Rule 55.04, than later in rebuttal under Rule 55.05. It should not be admitted, say the Plaintiffs.

[25] Further, the Plaintiffs take issue with the rebuttal opinion at paragraph 4, page 2, with the mention of Dr. Fashir's consultation notes, the statement that Mr. McKinnon was "clearly improving" and agreement with the approach of Dr. Fashir.

[26] The Plaintiffs submit, there is no mention of these things, in the report of Dr. Etches. It is wrong, they say, for Dr. Bernstein to speculate about another cause of illness, which is conspicuously absent from the medical records.

[27] There are numerous other issues which the Plaintiffs have with Dr. Bernstein's opinion, including the treatment and therapy opted for by Dr. Fashir. (Paragraph 4 page 2)

[28] Dr. Bernstein discussed the effectiveness of steroids (i.e. Budensonide) as a means of treatment. And again, the Plaintiffs' state, it is improper to criticize what Dr. Etches said based on a "novel differential diagnosis".

[29] The Plaintiffs say, a further example of improper rebuttal, is the fact that Dr. Etches makes no mention of whether Dr. Cadegan was attentive. Dr. Bernstein makes a point of stating that Dr. Cadegan was "quite attentive to his patient".

[30] The Plaintiffs' argue the fact that Dr. Bernstein's opinion is based on his assessment of the entire case. This is a whole new opinion and not restricted to rebutting Dr. Etches opinion, they submit. This underscores the lack of "quoted statements" with which the rebuttal expert disagrees, say the Plaintiffs.

[31] The Defendant submits these statements of Dr. Bernstein relate directly to whether the correct treatment was given, and whether the treatment fell below the standard of care.

[32] The Defendant says, Dr. Bernstein was pointing out that lymphocytic colitis is not commonly managed by general practitioners but in his experience, is often co-managed.

[33] The Defendant submits the brevity of Dr. Etches' report should not prevent or restrict Dr. Bernstein from giving a complete report as required by Rule 55.04(1)(c) and Rule 55.05(2)(b). The Defendant says it is a material fact that Dr. Cadegan referred Mr. McKinnon to Dr. Fashir for guidance.

[34] The Plaintiffs argue Dr. Bernstein's speculation about "gastroenteritis are not relevant". They suggest this is unrelated to how a family doctor should approach colitis. This idea or notion, they say, is absent from the medical records.

[35] The Defendant strongly disagrees, pointing to Dr. Fashir's consultation letter dated January 14, 2015, which clearly mentions "viral gastroenteritis". There is no speculation, argues the Defendant. These are also questions of fact, upon which, evidence is yet to be called.

Decision

[36] Read as a whole, I do not find that Dr. Bernstein's report offends the rule in any substantive way. It is true he does not quote each paragraph verbatim as required by Rule 55.05(c) but Dr. Etches' report is referred to twice at the outset of Dr. Bernstein's Report.

[37] Dr. Bernstein refers to Dr. Etches in his concluding paragraphs by specifically quoting him, as required. I think the focus has to be on the contents of the report in assessing whether the opinion represents true rebuttal or new opinion evidence especially where, as here, the consequences of excluding the report as sought by the Plaintiffs, would be severe.

[38] Relative prejudice was something that Justice Rosinski was clearly mindful of in *Bruce*. In *Aberdeen v. Langley*, 2006 BCSC 2065, submitted by the Plaintiff, the Court expressed similar sentiments in balancing fairness under the rules at paragraph 14.

[39] I find a rebuttal expert must be able to say words to the effect "I disagree and this is why". If the reason for disagreement pertains to another theory, then the rebuttal expert is entitled to state that theory. In fact, he is required to state it. Explaining his or her theoretical basis is permissible under Rule 55.04.

[40] Dr. Bernstein's disagreement with Dr. Etches, in my view, is not further opinion with no link to rebuttal. Rather it is his reason for rebuttal.

[41] The Plaintiffs will have opportunity to challenge the basis for his opinion on cross examination.

Conclusion

[42] The Defendant states, in short, to exclude these or other positions of Dr. Bernstein's report, would be to prevent him from providing a complete explanation as to the reasons why he disagrees with Dr. Etches' conclusions that Dr. Cadegan: 1) Never administered the correct treatment; and 2) Fell below the standard of care.

[43] I concur. The Plaintiffs' motion is therefore, respectfully dismissed.

Dr. Allan Drummond

[44] The Plaintiffs' objections to the admissibility of Dr. Drummond's report are two fold. First the Plaintiffs' draw the Courts attention to the leading case of *White Burgess Langille Inman v. Abbott and Halibuton Co.*, 2015 S.C.C. 23, and the important "gate keeper" role the Court has with respect to limiting expert evidence that does not meet the threshold requirements of admissibility. These include relevance, necessity and a properly qualified expert.

[45] It is a major issue on this motion whether Dr. Drummond is qualified to comment and give evidence regarding the cause of Mr. McKinnon's death. The Plaintiffs argue that Dr. Drummond, a family doctor, is opining on cardiac risk factors and cardiovascular disease. The Plaintiffs' say, he is not qualified to provide this opinion, as he is not a cardiac physician.

[46] In addition, the Plaintiffs' take issue with the framing of the opinion by Dr. Drummond to the originating report of Dr. Southey. This second prong of the Plaintiffs' argument is related to page 5 of Dr. Drummond's report, in particular, which contains the "crux" of the Plaintiffs' objection, they say. They say the paragraph beginning with "The cause of death" down to and including the paragraph "As such these events are unpredictable", contains entirely new evidence under the guise of being a rebuttal report.

[47] The Plaintiffs state this is included in the factual review of Dr. Drummond, and is therefore, misleading. Further, as it is rebuttal, Dr. Southey would have had

to comment on this, in his report. Rebuttal evidence must be logically related to the opinion being rebutted. The Plaintiffs say, it is not.

[48] The Defendant submits, that Dr. Drummond is indeed responding to the opinion of Dr. Southey, stating the “crux” of Dr. Southey report being opined upon is contained in the last paragraph on page 4, extending to the top of page 5.

[49] In this paragraph, Dr. Southey, speaking of Mr. McKinnon, referred to “persistent worsening malnourishment” to the point of “essential electrolyte depletion;” to the point of “a lethal cardiac arrhythmia”. Dr. Southey concludes on page 5, referring to a “gradual starvation that was occurring over ten and a half weeks with nutrient losses from diarrhea”.

[50] The Plaintiffs’ objections to Dr. Drummond’s report are numerous and may be described as follows, in point form: 1) It strays beyond the provisions of Rule 55.05; 2) It strays beyond the limits of his expertise; 3) The statement that Mr. McKinnon’s stools were “more formed” and he was “feeling well”; 4) The threshold requirement of a properly qualified expert; 5) Dr. Drummond’s statement, “it is unclear the documented hypomagnesemia had anything to do with his sudden death”, this is fresh opinion evidence in contravention of Rule 55, the Plaintiffs state; 6) Novel theories of causation are inadmissible as they are not properly the subject of reply evidence, i.e. cardiac risk factors; 7) Dr. Drummond cannot opine on causation, i.e. cause of death, unless he possesses specialized training; 8) He must have acquired specialized or particular knowledge through study or experience; 9) Dr Drummond conflating cause of death with the standard of care; 10) He is qualified in the fields of family medicine and emergency medicine, but has no special training in cardiology.

Decision

[51] There are a number of factors including procedural issues which, in my view, compel me to take a practical approach to whether this rebuttal report should be admitted and/or redacted.

[52] I will say at the outset, I have concerns with the opinion of Dr. Drummond being included in the review of facts portion of his report.

[53] That said, no written notice of the objection to the report was provided to the Defendant as required by Rule 55.10. The Plaintiffs’ counsel acknowledges it was raised during the Trial Readiness Conference that a motion would be raised. That

however, occurred in late August, 2020, in respect of a trial beginning before mid October.

[54] Secondly, Dr. Drummond's report was provided to the Plaintiffs' in early April, 2020. In it was his Curriculum Vitae as well as the statement of the qualifications sought, which asked that he be qualified as an expert in the field of family medicine, capable of giving opinion evidence on that subject, including the standard of care required by a family medicine practitioner, and the cause of death of Leroy McKinnon.

[55] Having weighed and considered the submissions, I have been persuaded that a flexible approach is required in these circumstances. It is late in the proceedings to cause this report to be declared inadmissible when no objection was made to the qualification sought.

[57] In addition, this approach is not dissimilar to the approach adopted by Justice Rosinski in *Bruce*, where the harsh remedy of exclusion was refused. I have been persuaded through balancing the relative prejudice that the Defendant should be given a full opportunity to make answer and defence. In these circumstances the distinction between opining on the standard of care and the cause of death, is not an easy or clear one. I am not satisfied the evidence of Dr. Drummond is new as opposed to rebuttal evidence. I am also satisfied that a full explanation at trial subject to cross examination will assist the jury with that understanding.

[58] A disagreement on what the evidence will contain is not a reason to exclude the report. The facts relied upon by Dr. Drummond, or any other expert, must still be proven.

[56] Finally, in terms of Dr. Drummond's qualifications, he has been a coroner for the Province of Ontario since 1994, a period of 26 years. As well, I note, around that same time he participated in a symposium, entitled "managing cardiovascular emergencies" at the 1995 annual meeting of Canadian Emergency Physicians.

[57] His qualifications in the field of emergency medicine appears to be well documented. He will be available for cross examination on these matters. It should also be noted that Dr. Southey has provided an extensive sur-rebuttal report in response to Dr. Drummond's report, which I presume will be evidence before

the Court. At this point, I am therefore dismissing the motion of the Plaintiffs' to exclude and/or redact the rebuttal report of Dr. Drummond.

Murray, J.