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IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120425
Docket: M052368
Registry: Vancouver

Between:

Alan Lennox

Plaintiff

And:

Azmal Ahmed-Rumiul Karim

Defendant

Before: The Honourable Mr. Justice Armstrong

Oral Reasons for Judgment
On the Admissibility of Report of Dr. Leith

Counsel for Plaintiff	S.J. Turner J.A. Pankiw-Petty
Counsel for Defendant	T.H. Pettit
Place and Date of Hearing:	Vancouver, B.C. April 23 – 24, 2012
Place and Date of Judgment:	Vancouver, B.C. April 25, 2012

[1] **THE COURT:** The plaintiff was injured in a car accident on August 16, 2003. This action was commenced on May 30, 2005, with a statement of claim that enumerated multiple injuries suffered in the accident. For the purposes of this ruling, I will deal only with the allegation in para. 5(e) that Mr. Lennox suffered injuries to the knees.

[2] The proceeding seems to have languished for several years, and I was told that the parties eventually appeared at a case planning conference on December 17, 2010. At the conference, the plaintiff's case plan included references that he would be relying on expert opinion evidence of two treating doctors, a Dr. Yanosky and a Dr. Weiler, who had given reports in 2008. Mr. Turner advised that during the case planning conference he expressed his intention to obtain further medical evidence; however, that intention was not recorded in the case planning conference order, nor was any subsequent order given under Rule 11-1(2).

[3] On January 9, 2012, the plaintiff obtained a medicolegal report from Dr. R.N. Stewart. That report contains several opinions about Mr. Lennox, including the following. In her opinion, Mr. Lennox suffered soft tissue injury to his neck, upper back, lower back, right forearm, wrist and right knee in the August 2003 motor vehicle accident. It is likely that the tear of the medial meniscus noted on the MRI scan was attributable to the accident.

[4] Due to the injury to his back, he was unable to continue his physically demanding job as a Steadicam operator in the film industry. He appropriately attempted to educate himself and secure work in less demanding jobs.

[5] He is likely somewhat depressed because of the limitations imposed by his injuries in the motor vehicle accident. She recommended he have psychological counselling to assist in his adjustment to his injuries and to provide pain management strategies.

[6] It is likely that he will continue to experience all of his current symptoms and activity limitations resulting from the accident over the long term.

[7] Because of the meniscal tear, he is at risk for the development of degenerative changes in the right knee, although she would defer to an orthopaedic surgeon as to the likelihood he would require surgery.

[8] The injuries to his neck and back will not lead to degenerative changes in his spine in the future.

[9] That report was served on the defendant towards the end of January 2012. It was actually January 27, 2012, which was by my calculation some 87 days before the commencement of trial.

[10] The defendant obtained a medicolegal report from Dr. Leith, which was served on the plaintiff's under Rule 11-6(4). The Leith report contains a critique of the Stewart report coupled with an opinion that is contrary to the Stewart opinion. A summary of Dr. Leith's opinions are these.

[11] Based on the review of records provided from an orthopaedic perspective, he did not sustain any medial meniscal tear to his right knee as a result of the subject accident. Dr. Stewart failed to acknowledge that Mr. Lennox did not present initially with acute knee pain. This is inconsistent with the medial meniscus tear. The location of the pain is not at all close to where symptoms from a medial meniscus tear would occur. Based on the principle of anatomic location and correlation of symptoms it is impossible that the meniscal tear occurred at the time of the accident.

[12] The clinical presentation following the accident was not consistent with an acute injury, such as a medial meniscus tear. There was no immediate pain, swelling or mechanical symptoms noted. He presented to medical practitioners with only minor anterior knee pain and a normal physical examination.

[13] The records do not indicate that there was a history of Mr. Lennox's knee striking the dash on impact, but this is the history he provided to Dr. Stewart. The mechanism of a direct anterior blow to the knee would result in a contusion to the

anterior knee, which is the location of the pain that was documented in the records following the subject accident. Clearly not a meniscus tear clinical presentation.

[14] A direct blow to the anterior knee is not consistent with the establishment of a meniscus tear. Meniscus tears usually occur when the knee is under load and a torsional force is applied, such as when standing and pivoting on a planted foot with deep knee bending or twisting. Meniscus tears reported on the MRI as complex are most often seen in patients over 40 and are classified as a degenerative type of tear rather than a traumatic tear.

[15] MRIs cannot determine when the pathology shown on the MRI actually occurred. It is important to correlate the MRI findings with the history of the traumatic event and clinical presentation following traumatic event and to review the mechanisms of the trauma. It is clear the clinical presentation and mechanism of the subject accident were not consistent with an acute meniscus tear.

[16] The events that involved the right knee in 2004 that ended up being diagnosed as cellulitis were unrelated to the subject accident but led to an incidental investigation providing another diagnosis. The events leading up to the MRI were only incidental and should not be erroneously attributed to the accident.

[17] Mr. Lennox did not suffer a medial meniscus tear as a result of the accident. He suffered only a minor anterior knee pain that would be consistent with a mild contusion soft tissue irritation. This would be expected to resolve rather rapidly over a period of a few weeks. The records supported this expected outcome.

[18] What has occurred is that Mr. Lennox suffered an independent problem to the right knee well after the accident that was diagnosed as superficial skin infection. This recovered but due to investigations and incidental findings on the MRI, a link to those findings to the accident was made without clinical correlation.

[19] The plaintiff objects to the admissibility of Dr. Leith's report on the basis that it does not meet the requirements of admissibility under Rules 11-6(3) or (4). They

argue that the Leith report is fresh opinion evidence and that, based on the decision of Smith J. in *Crane v. Lee*, I should refuse to admit the report into evidence.

[20] The plaintiff says that the report is not responsive because of the conclusion that the plaintiff did not sustain a medial meniscus tear in the accident. He says that Dr. Leith's opinion as to the cause of the meniscus tear is the central issue in the lawsuit and does not constitute true rebuttal evidence.

[21] I inferred that the plaintiff's position was that the defendant had an independent obligation to investigate the plaintiff's knee injury if they wished to tender evidence against this proposition.

[22] The plaintiff argued that the defendant's letter of instruction to Dr. Leith included seven specific issues that did not clearly outline that the report was to be a response to Dr. Stewart's opinion. In my view, this objection is without merit insofar as the issue advanced by the plaintiff is the admissibility of the report and whether the terms of that report are responsive to the opinions of Dr. Stewart. That issue is to be discerned from the pleadings.

[23] Mr. Pettit said that there was a telephone conversation with Dr. Leith, which explains why his report is clearly drafted as a response to opinions given by Dr. Stewart, although the letter does not mention a specific direction to that effect.

[24] Mr. Pettit also noted that the instruction letter to Dr. Stewart contained no specific instructions except a request that she delay writing a report until Mr. Turner had been able to speak to her. In my view, nothing turns on those facts leading up to the preparation of the two reports.

[25] The plaintiff also points out that Dr. Leith was given access to records and surveillance videos that were not referenced in Dr. Stewart's report. However, Dr. Leith did not include references to any of those documents or the facts contained in those documents in support of his opinion.

[26] The plaintiff also argues that the defendants were invited to have the plaintiffs seen by an independent medical examiner and took no steps to obtain an opinion. They argue that the defendant simply delayed in obtaining and serving expert evidence in an attempt to introduce all of their expert evidence as a response to the plaintiff's report. They argue that the Leith report is a freestanding medical opinion and not a responding report.

[27] The defendant pointed to the plaintiff's failure to disclose Dr. Stewart's upcoming opinion at the CPC in December 2010. That failure could be fatal to the plaintiff's intention to introduce Dr. Stewart's report at this trial. At the time, the plaintiff disclosed their intent to rely on opinions only from Dr. Yanosky and Dr. Weiler.

[28] Rule 11-1(2) is a bar to tendering Dr. Stewart's report without further order of the court. The plaintiff has not asked for such an order. The defendants do not wish to rely on this rule to exclude Dr. Stewart's report, because that would result in an adjournment of the trial and he hoped that by proceeding the trial date could be saved. Nevertheless, he suggested that if Dr. Leith's report is excluded, he reserved the right to make application for an adjournment so as to be able to tender the report within an allowed time.

[29] I am somewhat troubled by the timing of the exchanges of the reports as it impacts on the plaintiff's objection. The Stewart report was served January 27, 2012, some 86 days prior to the trial. Although this is in compliance with the rule, I observe that the statement of claim refers only to a knee injury without any specific reference to the type of injury alleged by the plaintiff and the proper notice of Dr. Stewart's report or their intention to rely on Dr. Stewart's opinion evidence was not given.

[30] The defendant argues that Dr. Leith's report is in its entirety truly a responsive rebuttal report. Dr. Leith sets out 10 conclusions, each dealing with the opinions given by Dr. Stewart. His report focuses on the one aspect of the plaintiff's injuries, that is, his meniscus tear, and deals with conclusions relating to that finding.

[31] Dr. Leith addressed the opinions of Dr. Stewart directly, and his conclusions were proceeded by this statement in his letter:

> Unfortunately I respectfully disagree with the conclusions drawn by Dr. Stewart regarding the right knee meniscus pathology and its relation to the subject accident for the following reasons ...

And then he sets out the reasons which I have mentioned previously.

[32] In my view, the Leith report is truly a responsive rebuttal report as described by Savage J. in *Wright v. Bauer*. In the analysis of this question, the comments of Henderson J. in *Canadian National Railway v. Canada* are instructive. In that case the court was referring to a rebuttal opinion coming from the plaintiff in response to a defence reply opinion. Justice Henderson said:

> [25] When I come to apply that settled principle of law to these reports, I find that the Byrne report is clearly inadmissible as reply or rebuttal evidence, in its entirety. It is simply a fresh opinion on the merits. It makes no effort to respond directly to the defence experts or to criticize their assumptions and methodology. It simply asserts (or reasserts) the merits of the plaintiff's claim. The report represents a classic instance of case splitting and should be adduced, if it is adduced at all, as part of the plaintiff's case in chief.
>
> [26] ... Those portions of the Bredehoeft report which consist of a critical review (in the words of the authors) of the analysis of the defence expert reports are admissible as true rebuttal or reply evidence. Those portions which describe the author's own assessment of the cause of the embankment failure are not admissible as reply evidence and must be admitted, if they are admitted at all, as part of the plaintiff's case in chief.

[33] The last statement by Henderson J. is not applicable to the circumstances in this case. The plaintiff in that case had already delivered opinion evidence as to the cause of the slide. One of the new reports was in part rebuttal but also a direct repetition of the plaintiff's claims in the action. The other new report was simply restating the plaintiff's positions.

[34] The defendant in this case is responding only to the plaintiff's expert and is not being tendered to give evidence of an independent opinion. Rather, his opinion is tendered to explain the reasons why he disagrees with the opinions and conclusions of Dr. Stewart.

[35] Cullen J., as he then was, said this in *Luedecke* at para. 49:

> [49] Although the plaintiff submits that Dr. Reebye should be limited in his report to "criticizing the methodology or the research or pointing out facts apparent from the records which the other examiners may have overlooked" based on Justice Savage's apparent reliance on *C.N. Rail*, *supra*, I do not take from Savage J.'s judgment that responsive opinions are invariably limited to "a critical analysis of the methodology of the opposing expert."
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> [50] In *C.N. Rail*, *supra*, Henderson J. was dealing with rebuttal evidence in the classic sense described by Southin J.A. in *Sterritt v. McLeod*, *supra*, as simply evidence responsive to some point in the oral evidence of the witness called by the defendant.
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> [51] What is at issue in the present case is a different form of responsive evidence, recognized in *Stainer v. Plaza*, *supra*, as distinct in paragraph 15, where Finch J.A. (as he then was) noted:
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>> The third condition in the order is directed to the third party calling an independent medical examiner "for rebuttal evidence" I understand from counsel that this refers not to rebuttal evidence as generally understood, but to evidence that is purely responsive to medical evidence which the plaintiff has led as part of her case. It would not apply to opinion evidence offered by the third party on subject matters not adduced in the medical evidence adduced by the plaintiff.
>
> [52] I thus conclude that what is referred to in Rule 11-6(4) is not akin to rebuttal evidence such as that called by a plaintiff in response to a defendant's case, with its consequent limitations. Nor is it akin to expert evidence that responds generally to the subject matter of the plaintiff's case. Rather, it refers to evidence that is "purely responsive" to the medical evidence which the other party has called.

[36] In the circumstances of this case, the Leith opinion is purely responsive medical evidence to the evidence adduced by the plaintiff.

[37] I accept the defendant's concerns about the evidence surrounding the decision of Smith J. in *Crane*. In this case I find that the Leith report is limited to and is truly responsive to the evidence given by Stewart. The facts in *Crane* were not fully described.

[38] In this case, Mr. Lennox failed to alert the defendant to the central issue of a torn meniscus. His pleadings indicated an injury of both knees without any reference in specific to the torn meniscus. This is significant in this case, because the plaintiff was under the obligation to obtain a court order to permit Dr. Stewart to testify and if that order had been applied for, the defendant would have been put on notice at an earlier time as to the issue which became central to this case.

[39] In my view the Leith report, in the words of Smith J., is not a freestanding medical opinion that ought to have been served under Rule 11-6(3). It is in its entirety a responsive opinion directed solely to one opinion of Dr. Stewart relating to the plaintiff's medical condition, that being the torn meniscus.

[40] There is one exception to this conclusion. Dr. Leith comments that the events of 2004 being diagnosed as cellulitis were unrelated to the subject accident. This latter observation coupled with his remark that the plaintiff suffered an independent problem to the right knee well after the subject accident when he was diagnosed with a skin infection are opinions that were not responsive to any opinions contained in Dr. Stewart's report. Other than that qualification, I find Dr. Leith's report to deal directly with the methodology, analysis and conclusions of Dr. Stewart, but the comments of Finch J.A. in *Stainer v. Plaza* are apposite. It would not apply to opinion evidence offered by the third party on subject matters not adduced in the medical evidence adduced by the plaintiff.

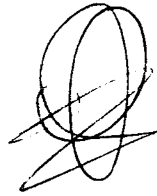
[41] The evidence relating to the 2004 events, the cellulitis and the skin infection, were not opinions given by Dr. Stewart. In my view, those two opinions ought to be expunged, or cannot be relied upon by the defendant, because they are not truly responsive to Dr. Stewart's opinions.

[42] If I am wrong in this decision, it would have also been my further opinion that in the circumstances of this case the defendant would have otherwise been entitled to an adjournment of the trial to secure the medical report of Dr. Leith if it was not otherwise admissible under 11-6(4). It seems to me that 11-1(2) is purposely directed at requiring the plaintiff and defendant to avoid the last minute introduction of medical evidence in cases which may have proceeded for many years on a different track or a different theory. I note that neither of the experts described in the CPC report have been or are going to be called as witnesses in this case, but I am not required to deal with that issue.

[43] It seems to me that Dr. Leith's report can simply be admitted and I can ignore those provisions which in my view are not appropriate. Historically we used to sort of expunge them with a black pen, but in the circumstances – Mr. Turner, what would your view be on that?

[44] MR. TURNER: I'm content with Your Lordship's discretion to just ignore those portions without the redaction.

[45] THE COURT: Okay.



Armstrong J.