IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20160510
Docket: M160840
Registry: New Westminster

Between:

Teresa Anderson

Plaintiff

And

Glen Pieters, Gold Key Sales and Lease Ltd., and Acrotech Cleaning Systems Inc.

Defendants

Before: The Honourable Mr. Justice A. Saunders

Oral Ruling on Voir Dire #5

Counsel for the Plaintiff:	G.A. Smith
Counsel for the Defendants:	T. Pettit
Place and Date of Trial/Hearing:	New Westminster, B.C. May 10, 2016
Place and Date of Judgment:	New Westminster, B.C. May 10, 2016

[1] **THE COURT:** This is a ruling on defence objections to the plaintiff's cross-examination of the defence witness, Dr. Otterstrom, the plaintiff's chiropractor, which was taken by video.

[2] The defence examination in chief of the witness dealt primarily with differences or similarities between pre-accident and post-accident treatments.

[3] The cross-examination of Dr. Otterstrom substantially took a different tack and largely focused on the consequences with respect to areas of the spine of injuries of the type sustained by the plaintiff. This was done through what was, on its face, presented as factual evidence, that is, presented in terms of what the witness typically sees or has seen in treating patients with these sorts of injuries.

[4] The plaintiff concedes that some of the cross-examination did go into opinion and that to some extent what she says is the matters of fact which were gone into on the cross are inextricably linked with opinion evidence. However, the plaintiff says that, to the extent there is opinion evidence, it is rebuttal of the opinion of the defence orthopedic surgeon, that is Dr. Arthur, is it?

[5] MR. PETTIT: Yes.

[6] THE COURT: Dr. Arthur. I have that right? Thank you -- and says that the court should, therefore, exercise its discretion in favour of admitting the opinion evidence elicited from Dr. Otterstrom.

[7] The plaintiff says that the factual evidence as to, for example, matters of anatomy is uncontroversial and may be of assistance to the jury in terms of giving them a better understanding of all of the expert medical evidence in this case as a whole.

[8] I find, with limited exceptions which I will go into, the cross-examination to be objectionable and only those portions that I am going to specifically direct to be admissible will be played to the jury.

[9] In brief, the opinions presented by Dr. Otterstrom are not rebuttal. They are not true rebuttal. They may be contrary to the opinion of Dr. Arthur, but that does not make the opinions rebuttal evidence, in the sense in which the Rules and our body of case law uses that term.

[10] The opinions expressed were capable of having been adduced, if at all, in a proper initial expert's report served at least 84 days prior to trial. There is no new fact or theory presented by Dr. Arthur. Indeed, the entire cross-examination of the witness is conducted without any portion of Dr. Arthur's evidence being put to Dr. Otterstrom and him being asked to comment on it.

[11] The factual issues as to matters of anatomy or physiology, which were gone into with Dr. Otterstrom, may be uncontroversial, but in my view there is a real risk of prejudice in adducing that evidence, in that the jury is not equipped to draw inferences from the factual information that is presented.

[12] To use an example, a medical witness might say that cervical ligaments may have been stretched or strained during a collision. That does not mean that this jury is equipped to conclude that this plaintiff has suffered such an injury, nor are they equipped to determine what the consequences of that injury might be.

[13] Such kinds of factual evidence ought to come only from the mouth of an expert who has drawn inferences from the facts and who has put those facts and inferences together into an expert opinion report.

[14] It is not for the jury to take facts that are presented to them in a vacuum, without the context of an expert's opinion, and to attempt to apply those to the opinions of other experts or to use them in understanding the reports of those other experts.

[15] We have no basis, in my view, to conclude that the factual evidence that was offered by Dr. Otterstrom is necessary to the jurors' understanding of the reports of, for example, the plaintiff's physiatrist, Dr. Craig, who has already testified. We do not know whether, for example, Dr. Craig would even have accepted

Dr. Otterstrom's descriptions of the anatomical issues as accurate. Any factual information necessary to the understanding of Dr. Craig's report ought to have come from Dr. Craig. Similarly, any other expert report requiring certain facts for their full and proper understanding by the jury ought to have those facts incorporated into those experts reports.

[16] I find no compelling grounds here for permitting the plaintiff to avoid the obligation to have expert opinion presented to the jury, when it has not complied with the Rules.

[17] The defendant has not had an opportunity to cross-examine this witness on the opinion elicited through cross-examination. The opinions were presented without any notice. There was not, and until this voir dire was held there still was not, an unequivocal statement made by the plaintiff that there was an intention to rely upon Dr. Otterstrom's cross-examination evidence as opinion evidence *per se*.

[18] There has been no acknowledgment made by Dr. Otterstrom of his obligation to the court with respect to his duty to assist as required by Rule 11-2(1), and while the plaintiff submits that the defendant has not been prejudiced, in that they have the opportunity to – that the defence had an opportunity to obtain a rebuttal report from a radiologist, the defence, not having received formal notice of the plaintiff's intentions, has been left hanging as to whether that radiologist or for that matter any other expert, would be required to rebut Dr. Otterstrom's opinions.

[19] To say that the defence has not been prejudiced sets the bar for admission too low. The consequence of an absence of prejudice being demonstrated under Rule 11-7(6) is not that the report becomes admissible, but that the trial judge's discretion to admit the report is engaged.

[20] To exercise that discretion in favour of admitting the opinion requires there to be some compelling reason or reasons. That is just not present in this case. Any opinion of Dr. Otterstrom could, and should, have been reduced to an expert report and served in accordance with the Rules – 84 days before trial.

[21] The opinion evidence being excluded, therefore, the portions of the cross-examination that deal with Dr. Otterstrom's training, experience and qualifications are irrelevant and are also to be excluded.

[22] I do find that some portions of the cross-examination are relevant and that they are clearly responsive to evidence elicited in the direct examination. Those portions of the cross-examination which I will allow are as follows.

1. Page 37, line 12, beginning, question, "You commented in response … to and including line 17, answer, "Yes."

2. Page 46, line 11, beginning question, "Okay. Now my friend has asked you … through to and including page 47, line 17, answer, "Yes."

3. Page 48, line 26, beginning question, "So just so the jury can … to and including line 38, answer, "Yes."

4. And finally, page 49, lines 35 through 40, that is question, "And you found that … to and including line 40, which is answer, "Yes."

[23] Those will be the only permitted portions of the cross-examination of Dr. Otterstrom.

[24] The re-examination by Mr. Pettit and the future cross-examination by Mr. Smith do arise out of appropriate areas. They are permissible and will be put to the jury in full.

[25] So that is my ruling on the deposition.

"A. Saunders J."