CITATION: Wray v. Pereira, 2018 ONSC 4621
OSHAWA COURT FILE NO.: CV-15-91778
DATE: 20180801

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Douglas Wray	)	T. Charney and A. Eckart, for the Plaintiff
Plaintiff	)	
– and –	)	
Rosemary Pereira and Gil Pereira	)	B. Lee and S. Zilli, for the Defendants
Defendants	)	
	)	**HEARD:** May 28, 2018

RULING RE: ADMISSION OF EXPERT EVIDENCE OF DR. FINKELSTEIN

MCKELVEY J.:

Introduction

[1] This action arises out of a motor vehicle accident which occurred on December 31, 2012. The case is being tried before a jury. The plaintiff alleges that he suffered a serious orthopedic injury to his right knee as a result of the motor vehicle accident. The evidence at trial indicates that the plaintiff had a significant pre-existing arthritic condition prior to the accident. The plaintiff asserts that he was asymptomatic prior to the accident, but that the arthritic condition has been rendered symptomatic as a result of the accident.

[2] The plaintiff has previously called two orthopedic surgeons who have given opinion evidence. This evidence links the plaintiff's current condition to the accident. The defence now wishes to call Dr. Joel Finkelstein as a medical expert. It is anticipated that Dr. Finkelstein will give an opinion that the plaintiff suffered a knee strain as a result of the accident which resolved within six to eight weeks. Dr. Finkelstein is expected to give an opinion that the plaintiff's current condition is the result of his pre-existing arthritic condition.

[3] A *voir dire* was held to determine the admissibility of Dr. Finkelstein's evidence. The plaintiff objected to the admission of Dr. Finkelstein's evidence on the basis that he has

relied on inadmissible evidence in reaching his opinions. Specifically the plaintiff objects on the basis that Dr. Finkelstein has reviewed a surveillance video taken by the defendant's investigator. This is referenced in his report. In a previous ruling I held that the surveillance video could not be used for substantive purposes in this action in large part based on the defendant's failure to comply with their disclosure obligations.

[4] The defence position is that it will suffer serious prejudice if Dr. Finkelstein is not allowed to testify. The defence argues that any prejudice can be minimized by requiring Dr. Finkelstein not to make any reference to the surveillance evidence in the course of his evidence. In response to this argument, the plaintiff states that there will still be significant prejudice because they will not be in a position to cross-examine Dr. Finkelstein about some of the evidence which he has relied upon in reaching his opinion. To do so would inevitably bring the existence of the surveillance, which has been held to be inadmissible, to the attention of the jury. The plaintiff therefore reiterates that it will suffer prejudice which cannot be remedied if Dr. Finkelstein is allowed to testify.

[5] I delivered an oral decision at the conclusion of argument on this motion. I concluded that Dr. Finkelstein would be allowed to testify on certain terms and conditions and that written reasons would follow. These are those written reasons.

Evidence of Dr. Finkelstein on the *Voir Dire*

[6] In cross-examining Dr. Finkelstein, the plaintiff's counsel volunteered that he was not challenging Dr. Finkelstein's integrity. I agree that there is no basis to do so. I found Dr. Finkelstein to be a professional and credible witness. He acknowledged, for example, that the issue of the surveillance had been brought to his attention several days prior to the *voir dire* and that he did not propose to make any comment about the surveillance during the course of his evidence. There was no evidence adduced at the voir dire which caused me to question his professional integrity.

[7] Dr. Finkelstein testified that the opinions expressed in his report were the same regardless of the surveillance. His normal practice in the event that he receives surveillance is to review it and provide a summary in his report. He did provide a summary of the surveillance in this case in his report. He testified that the surveillance was supportive of the opinion he had come to independently of the surveillance.

[8] Based on Dr. Finkelstein's evidence, I believe it is fair to conclude that Dr. Finkelstein's opinions were not directly impacted by the surveillance, but the surveillance was taken into account and was considered as being supportive of the opinions he had reached in this case. His opinions were to this extent influenced by the surveillance.

Analysis

[9] There does not appear to be a lot of case law which is directly on point. The plaintiff's solicitor referred to the decision of Justice Granger in *Youssef v. Cross* (1991), 80 DLR (4th) 314. In that case the court was asked to make a ruling as to whether a neurologist who had been retained by the defence to examine videos of the plaintiff would be entitled

to testify. The defence intended to call this expert to give an opinion that the plaintiff was a malingerer based upon his review of the video surveillance. The court found that the videos had not been properly produced to the plaintiff. Justice Granger stated that, "Accordingly, it was my intention to refuse to allow Dr. Girvin to express his opinion that the plaintiff was a malingerer as a result of the defence failing to produce the video prior to the commencement of trial."

[10] While the facts in the *Youssef* case bear some similarity to the ones before me, there are, however, significant differences. The *Youssef* case appears to have proceeded on the basis that the defence was in breach of its obligation to disclose the surveillance evidence. It also appears that the evidence of Dr. Girvin was based almost exclusively on the surveillance evidence. Thus, to allow Dr. Girvin to have testified in these circumstances would have been tantamount to allowing the surveillance evidence to be admitted indirectly in a situation where the court was not prepared to admit the evidence directly.

[11] In the case before me, while the surveillance evidence has been held to be inadmissible, Dr. Finkelstein arrived at his opinions to a large extent independently of the surveillance.

[12] There are a number of appellate decisions which stand for the proposition that expert evidence should not be excluded simply because to some extent it was based on inadmissible evidence. In the Supreme Court of Canada decision in *R. v. Lavallee*, 1990 CanLII 95 (SCC), the Supreme Court found that expert evidence may be admitted notwithstanding that the opinion is based on hearsay evidence. However, the weight to be attached to that opinion would be affected to the extent that it was based on inadmissible evidence.

[13] In *Marchand v. The Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA), the Ontario Court of Appeal commented that where the factual basis of an expert opinion is a "mélange of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies."

[14] The court in *Marchand* refers back to the Supreme Court's decision in *Lavallee* and states that proof of foundational facts goes to the weight to be accorded to the opinion rather than its admissibility. In the end, however, the court in *Marchand* finds that it was open to the trial judge to conclude that the appellant's refusal to prove the medical reports on which the opinion was based provided a sufficient basis for the trial judge to conclude that the expert's opinions would be entitled to no weight. It concludes,

> Given the protracted nature of the trial and the explicit position taken by the appellants as to what they would and would not prove, we would not interfere with the trial judge's decision not to hear evidence that would be given no weight.

[15] In deciding whether Dr. Finkelstein's evidence is admissible, I have concluded that the issue should be considered from the perspective of a court's general obligation to act as a

gatekeeper for the admission of expert evidence. In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 SCR 182, the Supreme Court comments on a court's gatekeeping role as follows:

> Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[16] In considering the admissibility of expert opinion evidence which is to some extent based on inadmissible surveillance evidence, I think it is reasonable to consider a number of factors including the following:

(a) To what extent is the expert's opinion based on inadmissible surveillance evidence and to what extent is it based on other admissible evidence?

(b) To the extent that the opinion is based on inadmissible evidence can a jury be properly instructed on the limited weight to be given to that evidence?

(c) To what extent will inadmissible evidence be introduced indirectly through the evidence of the expert?

(d) What is the prejudice to the party calling the witness if the evidence is excluded?

(e) What steps are available to minimize any prejudice if the expert is allowed to testify?

[17] In the present case I accept that Dr. Finkelstein's evidence is substantially based on his own examination of the plaintiff and his evidence under normal circumstances would be admissible. To the extent that Dr. Finkelstein has relied on the surveillance video, the degree of prejudice to the plaintiff has been substantially reduced. This is because in his cross-examination, defence counsel has cross-examined the plaintiff about the activities which are shown on the video. In his cross-examination the plaintiff has acknowledged his ability to carry out the relevant activities shown in the video. Thus, without referring to the surveillance video itself, plaintiff's counsel will be able to cross-examine Dr. Finkelstein on the foundational facts which form the substance of the video surveillance.

[18] The degree of prejudice to the plaintiff is further reduced because the critical issue in this case relates to the cause of the plaintiff's condition as opposed to his current level of activity. All of the expert's appear to agree, for example, that the plaintiff will likely require knee replacement surgery in the future. The area of major disagreement is

whether his current complaints are related to his pre-existing condition or to the motor vehicle accident. The surveillance video is of very limited relevance to that issue.

[19] To the extent that the plaintiff elects to cross-examine Dr. Finkelstein regarding his knowledge of the plaintiff's activities as shown in the video, there is no need to make reference to the video itself because as noted above the relevant facts are already in evidence. In this situation there is no reason why the jury cannot be properly instructed on issues to take into account when considering the weight to be given to any expert opinion, including that of Dr. Finkelstein.

[20] I accept that to exclude the evidence of Dr. Finkelstein has the potential to cause significant prejudice to the defence. The plaintiff has called two expert witnesses, both of whom have testified that the motor vehicle accident is the cause of the plaintiff's current condition. To exclude the evidence of Dr. Finkelstein would leave the defence without any expert evidence to respond. This situation has the potential to affect the fairness of the trial by excluding important and relevant evidence.

Conclusion

[21] For the reasons given above, I conclude that Dr. Finkelstein may testify as an expert for the defence on the following terms:

1. Dr. Finkelstein will not be allowed to comment on any of the surveillance evidence in his examination-in-chief.

2. On cross-examination, the plaintiff will be entitled to cross-examine Dr. Finkelstein on his knowledge of the plaintiff's activities as disclosed in the plaintiff's evidence, both in examination-in-chief and cross-examination. As noted above, the plaintiff's evidence on cross-examination includes reference to the significant activities shown on the video surveillance.

3. On cross-examination, the plaintiff will also be entitled to cross-examine Dr. Finkelstein on the surveillance video. However, if the plaintiff elects to cross-examine on the surveillance directly, this is without prejudice to the right of the defendant to conduct any re-examination it may be entitled to under the rules.

[22] While I have determined that Dr. Finkelstein is entitled to give evidence in this case, the question of admissibility is largely influenced by the factual circumstances in this case. In my view, defence counsel should not assume that a medical expert who has reviewed surveillance evidence will always be allowed to testify where the rules relating to that surveillance have not been complied with. There may certainly be situations where the probative value of the evidence is outweighed by its prejudicial effect. In the present case, however, I have concluded that the probative value exceeds any potential prejudice, but that conclusion is very much tied to the particular circumstances in this case.

Justice M. McKelvey

Released: August 1, 2018

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