CITATION: Wray v. Pereira, 2018 ONSC 4622
OSHAWA COURT FILE NO.: CV-15-91778
DATE: 20180801

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Douglas Wray	)	
Plaintiff	)	T. Charney and A. Eckart, for the Plaintiff
– and –	)	
Rosemary Pereira and Gil Pereira	)	
Defendants	)	B. Lee and S. Zilli, for the Defendants
	)	**HEARD:** May 17, 2018

RULING RE: ADMISSION OF EXPERT EVIDENCE OF DR. LUBA AND DR. OGILVIE-HARRIS

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 his motor vehicle accident.

[2] The plaintiff is proposing to call two orthopedic physicians. The first is Dr. Robert Luba who is his treating Orthopedic Surgeon. The plaintiff also proposes to call Dr. Daniel Ogilvie-Harris who is also an Orthopedic Surgeon and who was retained as a rule 53 expert by the plaintiff.

[3] The defence has brought a motion seeking to exclude Dr. Ogilvie-Harris from testifying.

[4] Following conclusion of argument on this motion, I delivered an oral decision and concluded that subject to certain conditions, both Dr. Luba and Dr. Ogilvie-Harris would be permitted to testify. I advised that written reasons would follow. These are those written reasons.

The Parties Positions

[5] The defence position is that Dr. Ogilvie-Harris' report duplicates the opinions provided by Dr. Luba and that the inclusion of a second orthopedic surgeon, whose conclusions are the same as the first, is not in the interest of a speedy and just resolution of this matter. Further, the defence argued that Dr. Ogilvie-Harris has been found to have blurred the boundary between acting as an expert witness and acting as an advocate in a number of court decisions. Finally, the defence refers to the fact that in responding to the plaintiff's case, it only has one expert and that allowing the plaintiff to introduce evidence from two orthopedic surgeons would unfairly prejudice the fairness of the trial for the defendants.

[6] The plaintiff in response takes the position that while there is some overlap between the evidence of Dr. Luba and Ogilvie-Harris, there are also a number of important differences which justifies allowing both physicians to testify. They also argue that to exclude Dr. Ogilvie-Harris, would leave the defence with the only rule 53 expert testifying at trial. It is argued that this would unfairly prejudice the plaintiff's ability to present its case at trial. They refer to the fact that Dr. Ogilvie-Harris has challenged the opinion of the defence Orthopedic Surgeon, Dr. Finkelstein, whereas Dr. Luba as a participant expert has not "entered the debate".

Analysis

[7] It is apparent that a critical issue for trial will be the extent to which the plaintiff's current symptoms are related to his pre-existing condition of arthritis as opposed to being the consequences of the motor vehicle accident. On this issue it would appear that the opinions of Dr. Ogilvie-Harris are quite important for the plaintiff's case. In his report dated December 14, 2016 which outlines his anticipated evidence, he states that prior to the accident the plaintiff had no symptoms, although arthritis was present. Subsequent to the accident, Dr. Ogilvie-Harris states that the plaintiff has suffered significant symptoms and functional loss which is consistent with aggravation of the pre-existing arthritis by the trauma of the motor vehicle accident. As a result he states, "the trauma has played a material role in producing pain, functional limitations and necessitating surgical intervention". The surgical intervention referred to by Dr. Ogilvie-Harris is knee replacement surgery.

[8] I accept that there appears to be some significant overlap between the opinions of Dr. Ogilvie-Harris and those of Dr. Luba. In a report prepared by Dr. Luba dated July 25, 2017, he states:

> My initial impression was that this gentleman had pre-existing osteoarthritis in his right knee which had been slightly bothering him but

> not significantly affecting his ability to function or to do the activities that he enjoyed doing on a day to day basis. However, trauma sustained at the time of the motor vehicle accident seemed to cause his right knee to flare up. The pre-existing arthritis which was not that bothersome became more of an issue and he started to develop swelling of the knee which led to Baker's Cyst formation posteriorly.

[9] It is significant to note that this is not a case where the plaintiff needs to seek leave of the court to call more than three experts pursuant to s. 12 of the *Evidence Act*, RSO 1990, c E.23. The plaintiff is only proposing to call one rule 53 expert. In *Davies v. The Corporation of the Municipality of Clarington*, 2016 ONSC 1079, Justice Edwards concluded at para. 40 that a plaintiff does not have to seek leave to call any of the plaintiff's treating doctor's to the extent that they are testifying as a participant expert. Thus, in this case, the plaintiff is only seeking to call one rule 53 expert. In any event, even if Dr. Luba is considered to be an expert witness, the total number of experts being called does not exceed three and leave is therefore not required under s. 12 of the *Evidence Act*.

[10] *Prima facie* a party has a right to call up to three rule 53 experts at trial. However, even if s. 12 of the *Evidence Act* is not engaged, I have concluded that this is subject to the right of the court to act as a gatekeeper to exclude evidence which is not necessary. Under the criteria established under the Supreme Court of Canada decision in *R. v. Mohan*, [1994] 2 SCR 9, necessity is a requirement for the admission of expert evidence. To the extent that the evidence of one expert simply duplicates that of another, there may well be a live issue as to whether an expert's evidence is necessary. As noted by Justice Edwards in the *Davies* decision, trial judges are constantly reminded of their obligation to act as the gatekeeper when it comes to the admission of expert evidence. However, in my view, where a party intends to call a participant expert, a court will be less inclined to exclude that evidence as it provides the relevant factual background which a court will require to understand the circumstances surrounding a party's treatment. In many cases the rule 53 experts will be relying on the opinions, observations and treatment decisions of treating clinicians when forming their rule 53 opinions.

[11] In the *Westerhof v. Gee Estate*, 2015 ONCA 206 decision, the Court of Appeal confirmed that a court retains its gatekeeper function in relation to opinion evidence from both participant and non-party experts. At para. 64 of their decision, the court concludes:

> As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents.

[12] I therefore conclude that a court is expected to exercise its gatekeeper function for all expert opinion regardless of whether the provisions of s. 12 of the *Evidence Act* are engaged. However, courts are less likely to intervene to exclude the evidence of a participant expert like Dr. Luba, where he provides factual evidence with respect to his treatment of the plaintiff, provided that his evidence does not go beyond the scope of an opinion formed in the course of treatment.

[13] With respect to the evidence of Dr. Ogilvie-Harris, it is apparent that his opinion, although it overlaps to some extent with Dr. Luba, has a number of significant differences. Dr. Ogilvie-Harris provides an opinion as to whether the injuries suffered by the plaintiff exceed the threshold set out in s. 267.5 of the *Insurance Act,* RSO 1990, c I.8. This is an opinion which would obviously be beyond the scope of a participant expert like Dr. Luba. Dr. Ogilvie-Harris has also challenged the opinion of the defence expert, Dr. Finkelstein, which will be an important consideration for the jury in its consideration of all the relevant evidence. It is also significant that as a rule 53 expert, Dr. Ogilvie-Harris has had the opportunity to consider all available and relevant information concerning the plaintiff's alleged injury. This contrasts with a participant expert like Dr. Luba who is limited to the information he had available at the time of his treatment.

[14] In these circumstances I have concluded that while there is some overlap between the opinions of Dr. Luba and Dr. Finkelstein, there are also important differences which justify the plaintiff being allowed to call both Dr. Luba as a participant expert and Dr. Ogilvie-Harris as a rule 53 expert. This is not a situation which in my view will represent, "overkill" as suggested by the defence.

[15] With respect to the defence allegation that Dr. Ogilvie-Harris has demonstrated bias or acted as an advocate as referenced in other court decisions, I am mindful that the prior judicial comments about an expert which the defendant relies on here are only the opinions of the court in other cases, which on their own should not be sufficient to disqualify Dr. Ogilvie-Harris. In *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, the Court of Appeal considered a ground of appeal based on the fact that the trial judge ruled that an expert could not be cross-examined regarding prior court or arbitral findings made against him. The Court of Appeal did not accept this argument and stated that the prior comments made about the expert did not amount to a finding of discreditable conduct. Rather they represented the opinions of a judge and two arbitrators regarding the reliability of his testimony in particular cases. The Court of Appeal did not think it would be useful to allow cross-examination of a witness on what is, in essence, no more than an opinion on the credibility of unrelated testimony given by the witness in the context of another case. At para. 32 of their decision in *Bruff-Murphy*, the court states:

> [T]he comments of the judge and arbitrators about Mr. Bail's testimony in the previous cases would have been of no assistance to the jury without an understanding of their factual foundation. That necessary context would only have served to divert the jury from the task at hand and convert the trial into an inquiry regarding the reliability of Dr. Bail's

> testimony in the three other proceedings. Thus, in my view, the trial judge did not err in prohibiting this line of cross-examination.

[16] In my view, if the defence in this case wishes to take issue with the issue of potential bias by Dr. Ogilvie-Harris, it should be done in the context of a *voir dire* in which the criteria under *R. v. Mohan* and subsequent case law including the Court of Appeal decision in *Bruff-Murphy* can properly be considered.

[17] For purposes of this decision, I have assumed that the opinion evidence to be given by Dr. Luba properly falls within the context of his role as a participant expert. To the extent that his evidence goes beyond those limits, then he would have to be qualified as a rule 53 expert. His evidence in that regard would then have to be considered separately under the court's gatekeeper function. This is consistent with the Court of Appeal's decision in *Westerhof*, where the Court states, "if participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits."

Conclusion

[18] For the reasons given above, I conclude that Dr. Luba may testify as a participant expert with respect to his treatment based on his personal observations or examinations which arise directly from his treatment of the plaintiff in this case. If there is an issue as to whether any of Dr. Luba's opinions arise out of his status as a participant expert, these should be addressed in the context of a *voir dire* if requested by defence counsel.

[19] Dr. Ogilvie-Harris will also be entitled to testify as a rule 53 expert. This is subject to the right of the defence to explore the issue of bias in the context of a *voir dire* and which is to be determined in accordance with the principles laid out in the *Mohan* case and subsequent case law.

[20] Finally, even had I concluded that it would inappropriate for the plaintiff to call both Dr. Luba and Dr. Ogilvie-Harris, I would not accept the defence position that I should require the plaintiff to call Dr. Luba over Dr. Ogilvie-Harris. The choice of which witness to call is within the discretion of the plaintiff. It would not be appropriate for the court to dictate to the plaintiff which of two witnesses should be called in the event that the overlap in evidence justifies excluding one of the witnesses.

Justice M. McKelvey

Released: August 1, 2018

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