CITATION: Taylor v. Durkee, 2017 ONSC 7357
OSHAWA COURT FILE NO.: CV-12-79214
DATE: 20171229

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DONNA TAYLOR Plaintiff	)	Barry Evans, for the Plaintiff
– and –	)	
DANIEL DURKEE and GREGORY DURKEE Defendants	)	Christopher A. Caston and Michelle Farb, for the Defendants
	)	**HEARD:** November 30, December 1, 2017

RULING RE: ADMISSIBILITY OF EXPERT EVIDENCE BY DR. HUGH CAMERON

MCKELVEY J.:

Background

[1] This case involves a claim for personal injury by the plaintiff, Donna Taylor, arising out of a motor vehicle accident. The plaintiff has introduced evidence that she suffers from a chronic pain syndrome or central sensitization. The evidence called by the plaintiff suggests that chronic pain syndrome is related to changes in brain chemistry, which in turn cause continuing and chronic suffering by individuals who suffer from this condition.

[2] In response, the defence proposes to call Dr. Hugh Cameron. Dr. Cameron is an Orthopedic Surgeon who has prepared two reports arising out of an examination which took place on June 23, 2015. The first report is dated June 23, 2015 and the second report is dated September 8, 2016, which comments in large part on reports delivered from other experts in which he provides his views on a number of issues including the central sensitization theory.

[3] This case is being tried before a jury. The plaintiff has brought an application to exclude portions of Dr. Cameron's evidence. The plaintiff agrees that Dr. Cameron should be

entitled to testify about the soft tissue injuries sustained by the plaintiff in the motor vehicle accident and when they should have healed. The plaintiff also acknowledges that Dr. Cameron should be able to testify about certain validity tests that he conducted during the course of his examination, but argues that Dr. Cameron should not be allowed to relate those findings to the conclusion he draws of symptom exaggeration. The plaintiff also objects to Dr. Cameron equating positive Waddell signs which were identified by another medical expert on his physical examination to symptom exaggeration. Finally, the plaintiff takes issue with Dr. Cameron's right to comment on the theory of chronic pain syndrome or central sensitization. In this regard, the plaintiff objects to Dr. Cameron's linking of central sensitization to secondary gain and his comment that chronic sensitization only occurs when there is compensation at issue.

[4] In summary, the plaintiff takes the position that Dr. Cameron should be limited to giving evidence as to whether there is an organic cause for the plaintiff's continuing complaints of pain. According to the plaintiff, Dr. Cameron should not be entitled to go further, to comment on the plaintiff's credibility or the plaintiff's chronic pain theory.

[5] I advised counsel of the limits which would be placed on Dr. Cameron's evidence orally on December 4, 2017 and advised that written reasons would follow. These are those written reasons.

The Applicable Legal Principles

[6] In *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, the Supreme Court set out the basic requirements for the admission of expert evidence. These requirements are relevance, necessity, the absence of an exclusionary rule and a properly qualified expert. These requirements were reviewed and refined by the Ontario Court of Appeal in *R. v. Abbey*, 2009 ONCA 624 (CanLII). In that decision Justice Doherty outlined a two stage process which a court should follow. In the first phase, Justice Doherty stated that four preconditions to admissibility must be established as follows:

1. The proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
2. The witness must be qualified to give the opinion;
3. The proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
4. The proposed opinion must be logically relevant to a material issue.

[7] At the second stage the court is required to act as a "gatekeeper" by balancing the benefit and cost of the proposed expert opinion. In the *Abbey* case, the Court of Appeal treated "necessity" not as a precondition to admissibility but as part of the "cost benefit" analysis to be evaluated at the gate keeping stage.

[8] The *Abbey* analysis was largely endorsed by the Supreme Court of Canada in its decision in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII).

However, in that decision the court emphasized that the four *Mohan* factors which include necessity are threshold requirements. Evidence that does not meet those threshold requirements should be excluded. Thus, necessity is a threshold requirement which must be met before considering the gatekeeper analysis.

[9] In the *R v. Abbey* decision, the Court of Appeal outlines some basic legal principles which apply. At para. 71 it notes that expert evidence is presumptively inadmissible. The party tendering the evidence must establish its admissibility on a balance of probabilities. Thus, the onus is on the defendant to satisfy this court that Dr. Cameron's opinions are admissible on a balance of probabilities.

[10] The Ontario Court of Appeal has recently considered the Mohan factors in the context of a personal injury claim in their decision of *Bruff-Murphy v. Gunawardena*, [2017] O.J. No. 3161. In that decision the court emphasized the court's important role as a gatekeeper in considering the cost benefit analysis. In that case, the court noted that there was a high probability that the expert would prove to be a troublesome expert witness, one who was intent on advocating for the defence and unwilling to properly fulfill his duties to the court. Similar issues have been raised by the plaintiff in this case about the proposed evidence of Dr. Cameron.

[11] The plaintiff argues that Dr. Cameron's proposed evidence that the plaintiff exhibits symptom magnification usurps the jury's function in determining the plaintiff's credibility and therefore has a high degree of potential prejudice in swaying the jury against the plaintiff.

[12] Initially during the argument the plaintiff took the position that Dr. Cameron showed evidence of bias. However, during the course of submissions the plaintiff's counsel acknowledged that there is no evidentiary foundation for such an allegation and this was withdrawn during the course of argument.

[13] There was no suggestion that Dr. Cameron's proposed evidence does not comply with the relevance and necessity criteria under *Mohan*, nor is there any exclusionary rule which would apply in the circumstances. Instead, the issues which were argued in this case related to the qualifications of Dr. Cameron to give evidence beyond his physical findings and the gatekeeping role which a court must consider before allowing expert evidence to be introduced at trial.

Analysis

[14] There is no issue about Dr. Cameron's general qualifications as an orthopedic surgeon. He was certified as an Orthopedic Surgeon in 1975 and is currently an Associate Professor at the University of Toronto Medical School. He has published over 200 papers. His major focus in practice has been on joint replacement and he has performed over 5000 knee replacement surgeries and over 4000 hip replacement surgeries. He has been accepted as an expert in orthopedic surgery on numerous occasions. I accept his evidence that diagnosing the cause of a patient's pain and whether it is organic is an

important consideration for his surgical practice. Dr. Cameron testified on the voir dire that chronic pain includes any pain which continues for a period of greater than six months. This includes almost all of his orthopedic patients. In order to predict whether a proposed surgery will be successful, an orthopedic surgeon needs to be able to assess the patient and determine whether the clinical evidence is bad enough to justify surgery. Perceived pain by a patient which is not supported by sufficient clinical evidence is likely to result in a poor result from surgery. Thus, differentiating the types of pain experienced by patients is an important part of Dr. Cameron's practice.

[15] I have therefore no difficulty in concluding that Dr. Cameron has sufficient qualifications to give evidence based on the history and physical examination taken of the plaintiff. This includes the results and significance of certain validity tests which were conducted by Dr. Cameron in order to determine the consistency or inconsistency of the plaintiff's reports of pain. Whether Dr. Cameron should also be entitled to provide the jury with his opinion that symptom exaggeration was present based on his examination of the plaintiff is a more difficult issue. I have concluded, however, that he should be entitled to provide this opinion in his evidence.

[16] Dr. Cameron's opinion that the plaintiff demonstrated symptom exaggeration is contained in his report of June 23, 2015 when he states,

> In summary, clinical examination in this case was normal. I was unable to detect any abnormalities at all. Symptom exaggeration was obviously present with no consistency whatsoever on tests and re-tests. There was ample evidence of magnification with complaints of back pain on pseudorotation and complaints of neck pain on pseudoaxial loading. There was dissociated straight leg raising. There were complaints of skin tenderness in a diffuse area around the neck. She complained of back pain on bent leg raising, hip rotation, side leg lifting and carrying out the piriformis manoeuvre.

[17] I accept that Dr. Cameron's opinion reflects negatively on the evidence given by the plaintiff about the pain symptoms she has suffered since the accident. It is, of course, the responsibility of the trier of fact to decide the truthfulness of the plaintiff's evidence and not the responsibility of an expert like Dr. Cameron. Dr. Cameron does not directly attack the plaintiff's credibility. However, his evidence may reflect negatively on the plaintiff. In this regard I view Dr. Cameron's evidence as being permissible even though it may have some bearing on the jury's ultimate determination on the question of credibility. In my view this is a common feature of expert evidence. Expert evidence often has either a positive or negative impact on the evidence of other parties or witnesses who are called to give evidence. An example based on facts totally unrelated to this case would be a situation where a witness claimed to have a clear view of an accident and yet a medical physician testified about limitations with respect to that person's eyesight which call into question the credibility of that witness or party's evidence.

[18] The plaintiff also argues that Dr. Cameron's opinion about symptom exaggeration should not be allowed because it is addressed to the ultimate issue before the jury. In this case, the ultimate issue before the jury is an assessment of the plaintiff's general damages. Thus, Dr. Cameron's opinion does not directly address the ultimate issue but it is apparent that his opinion has the potential to influence the jury with respect to the amount of general damages which should be awarded in this case.

[19] It is clear, however, that there is no absolute rule barring opinion evidence on the ultimate issue before the jury. See *R. v. Mohan*, [1994] 2 S.C.R. at p. 24. It is also apparent, however, that where an expert opinion is close to the ultimate issue, the criteria of necessity and cost benefit analysis are more strictly applied to exclude expert evidence. Having said that, it is routine in personal injury actions for medical experts to testify on their diagnosis and prognosis of a plaintiff's condition. Medical diagnoses are normally beyond the experience or knowledge of a jury and are important pieces of evidence for a jury to consider for a proper assessment of damages. In the present case the plaintiff has called its own expert who has given evidence that the plaintiff suffers from chronic pain syndrome or central sensitization, a condition which the expert says is likely permanent. Fairness would suggest that the defence expert ought to be able to express his opinion with respect to the medical diagnosis and prognosis for the plaintiff's condition which is at variance with that of the plaintiff's expert. Dr. Cameron in this case has set out his opinion and the reasons which led him to this conclusion. In my view his evidence does not go to the ultimate issue in this case. Dr. Cameron's opinion will be compared to that of the plaintiff's expert and the jury will be able to consider both opinions and the weight which should be given to them in reaching their conclusion on what amount is reasonable to compensate the plaintiff for her general damages. Thus, Dr. Cameron's opinion is evidence that the jury may take into account when assessing the nature of the injuries suffered by the plaintiff, just as they would with any other expert witness.

[20] I have therefore concluded that Dr. Cameron's opinion falls within his area of experience as an orthopedic surgeon and his routine assessment of different types of chronic pain. He will be entitled to give his opinion that the plaintiff has symptom magnification.

[21] Dr. Cameron will not, however, be permitted to give opinion evidence on the issue of chronic pain syndrome or central sensitization. I find that he does not have the necessary qualifications in this area and his evidence does not pass the necessary cost benefit analysis.

[22] Dr. Cameron's opinions about central sensitization are contained in his report of September 8, 2016, which comments on a report delivered from the plaintiff's expert. He states as follows in his report,

> This is a theory. The concept is that, if someone has pain somewhere or other for three months or six months or whatever, they will develop changes in the brain and spinal cord. It then does not matter what happens to the original pain, i.e. whether or not it goes away, the pain

> will remain because of the changes in the brain, hence, the well-known title of the pain in the brain syndrome.
>
> When this theory first came out several years ago, I was quite intrigued with it. However, after thinking about it for a few minutes, I realized that there were some discrepancies.
>
> After all, I have been an Orthopedic Surgeon for a long time. What I principally do for a living is replace joints. I have replaced in excess of 4000 hips and about 5000 knees.
>
> If this theory of central sensitization or pain in the brain syndrome was right, then I have (sic) wasting my time for the last 30 years because no patient would get better. Furthermore, all my joint replacement colleagues around the world would have been wasting their time and collectively between us we wasted the time of several million people because they would not get better.
>
> As in fact all orthopedic surgeon (sic) and most patients know, joint replacement is a highly successful procedure. The patient's pain goes away and they get back to work.
>
> It seems to me that this pain in the brain theory is only produced when there is compensation at issue. I thought that the American's were developing several firm rulings on the diagnosis of pain syndrome when compensation is at issue. In fact, I thought that they actually had published these rules but I have not seen them.

[23] In his cross-examination on the voir dire, Dr. Cameron acknowledged that he has done no independent study of central sensitization. In addition, the defence stated at this point in his cross-examination that they were not attempting to qualify Dr. Cameron as an expert in central sensitization (or chronic pain syndrome), but only on chronic pain. In my view it is clear that Dr. Cameron, based on his own evidence, is simply expressing his own personal views about chronic pain syndrome or central sensitization without having the necessary expertise to give an informed opinion about it. In terms of a cost benefit analysis, his opinion has little probative value and there is a significant risk that the jury could be unduly influenced by his opinions. This conclusion is supported by a significant inconsistency in Dr. Cameron's analysis. Dr. Cameron's comment that if the theory of central sensitization is correct, joint replacement surgery would be a waste of time is inconsistent with his other evidence that the purpose of assessing the true nature of a patient's pain is to identify those patients which will benefit from surgery from those who will not. His own evidence supports the importance of distinguishing between different types of pain to ensure that surgery is only performed on patients who are reasonably expected to benefit from surgery. In exercising this court's discretionary gatekeeping role, I therefore have concluded that Dr. Cameron should not be permitted to give any evidence with respect to the central sensitization theory. For the same reasons Dr.

Cameron will not be permitted to give any evidence with respect to the relationship between the central sensitization theory and the role of compensation in connection with this theory.

[24] In his report of September 8, 2016, Dr. Cameron comments that a self-assessment tool where the patient reports the degree of pain and functional limitation is not likely to be very accurate. I have concluded that those comments as contained in his report are properly admissible. The reliability of a patient's pain complaints are within his qualifications as an Orthopedic Surgeon and his participation in a research study on this point supports his expertise in this area. However, I have concluded that Dr. Cameron should be limited to the comments he makes in his report. His report does not include any commentary on his research project. In the voir dire, Dr. Cameron commented fairly extensively on his research. However, none of this information was contained in his report as required by Rule 53.03(2.1)(6)(ii). This provision requires an expert to include in his or her report a description of any research conducted by the expert that lead him or her to form the opinion.

[25] While Rule 53.08 authorizes leave to be granted to allow an expert to testify even where his report does not comply with Rule 53.03, it is subject to considering whether granting the leave "will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial". In this case the plaintiff has closed its case having already introduced the expert evidence it intends to rely on. I have concluded that the failure of the defence to advise the plaintiff of its intention to have Dr. Cameron comment on his research does cause prejudice to the plaintiff's position. The plaintiff has already called its own expert evidence and has closed its case. I therefore conclude that having failed to disclose the substance of his research in his report, Dr. Cameron should be strictly limited to the comments he made in the report on the value of the patient's self assessment tool.

[26] The final issue to be addressed in terms of Dr. Cameron's evidence is the need for him to present his evidence in a professional and respectful manner. I am concerned that some of Dr. Cameron's comments in his report as well as the voir dire are sarcastic and disparaging of other experts. I am concerned that such comments could unfairly prejudice the jury against other experts who have testified. For example, in his report as well as in his evidence on the voir dire, Dr. Cameron referred to the Waddell signs as the "Waddell signs of symptom exaggeration" despite the fact that the evidence at this trial has made it clear that Dr. Waddell never adopted this characterization and in fact disputed the inference that the Waddell signs were reflective of symptom exaggeration.

[27] Dr. Cameron also referred to the central sensitization theory as the "pain in the brain" syndrome which appears to be a term designed to disparage unfairly the plaintiff's theory. Another example is Dr. Cameron's refusal to acknowledge in his evidence that a chiropractor who has previously given evidence should be properly referred to as "Dr." despite the fact that in this jurisdiction that is the appropriate title for a chiropractor.

[28] I have therefore concluded that Dr. Cameron has a tendency to make unprofessional comments about the opinions of others that do not fall in line with his own. I have

advised counsel that Dr. Cameron will be expected to give his evidence before the jury in a professional manner. If he fails to do so I may intervene in his evidence before the jury and or direct some comments in my charge which will address his behaviour while giving evidence.

Justice M. McKelvey

Released: December 29, 2017

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