CITATION: Taylor v. Durkee, 2018 ONSC 489
COURT FILE NO.: CV-12-79214
DATE: 20180122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DONNA TAYLOR	)	Barry Evans, for the Plaintiff
Plaintiff	)	
– and –	)	
DANIEL DURKEE and GREGORY DURKEE	)	Christopher A. Caston and Michelle Farb, for the Defendants
Defendants	)	
	)	**HEARD:** December 7, 2017

REASONS FOR DECISION

MCKELVEY J.:

Introduction

[1] This action arises out of a motor vehicle accident which occurred on April 13, 2011. The plaintiff alleges that she has developed a chronic pain syndrome as a result of this accident. In support of this theory the plaintiff called Dr. Olgilvie-Harris who is an Orthopedic Surgeon with a particular interest in chronic pain syndrome. The defence called Dr. Cameron who is also an Orthopedic Surgeon but does not have a particular interest in chronic pain syndrome. He was qualified to give evidence with respect to chronic pain but not directly on the plaintiff's theory of chronic pain syndrome or central sensitization as it is otherwise known.

[2] Following the plaintiff's closing, the defence raised a number of objections with respect to this closing. These objections are as follows:

1. The plaintiff in his closing suggested to the jury that an adverse inference should be taken from the fact that no expert in chronic pain syndrome was called by the defence.

2. The plaintiff's counsel told the jury that the surveillance shown to the jury by the defence was an attempt by the defence to pull the wool over their eyes in suggesting that the surveillance is representative of the plaintiff's life.

3. The plaintiff submitted to the jury that the defence was working at all costs to minimize the award and that they had a team of six people on that side of the room attempting to discredit the plaintiff.

4. The plaintiff told the jury that the defendant, Mr. Durkee, was present in the courtroom during the trial even though he did not testify. The jury was told to ask itself why that was the case.

[3] In its submissions the defence advised that it was seeking a correcting instruction to the jury on the above-noted issues. Following argument I concluded that the comments by plaintiff's counsel, as noted above, were inappropriate and required a correcting instruction to the jury. I advised that written reasons for my decision would follow. These are those reasons.

The comments of plaintiff's counsel with respect to the expert evidence of Dr. Cameron

[4] During his closing, plaintiff's counsel told the jury that the defence expert, Dr. Cameron, had no experience in chronic pain syndrome. He asked the jury why the defendant would not call someone to tell them if the plaintiff's expert, Dr. Olgilvie-Harris was wrong. He suggested that there were a lot of experts available. He told the jury to ask themselves why the defence didn't call an expert in chronic pain syndrome. He asked the jury to consider whether this was because no expert in chronic pain syndrome would take the stand and say there was symptom exaggeration as suggested by Dr. Cameron.

[5] In my view, the comments of the plaintiff invited the jury to draw an adverse inference because the defence did not call an expert who was found to be specifically qualified to comment on chronic pain syndrome. The clear suggestion being made to the jury is that if the defence had retained an expert in chronic pain syndrome he or she would have disagreed with the expert opinion of Dr. Cameron who was called to give evidence on behalf of the defence.

[6] I have previously reviewed some basic principles concerning the applicable law on adverse inference in my decision in *Bishop-Gittens v. Lim*, 2015 ONSC 3971 (CanLII). In that case I referred to the usual criteria which must be satisfied before an adverse inference can be drawn based on the authorities. They are as follows:

(a) The witness must have key evidence to provide;

(b) There must be no adequate explanation for the failure of the party to call the witness; and,

(c) The witness must be within the exclusive control of the party against whom the adverse inference is sought to be drawn.

[7] In the present case there is no evidence that the defence retained a medical expert other than Dr. Cameron to comment on the plaintiff's injuries or her diagnosis. There is, therefore, no evidence to suggest that any other witness exists nor that any other opinion was in the control of the defence. This is not a situation where the defence in its opening or otherwise told the jury that they would hear from an expert other than Dr. Cameron. It is apparent, therefore, that the usual criteria for an adverse inference are not met in this case. The plaintiff's counsel acknowledged during submissions that he is not able to point to any authority which supports his position that an adverse inference would be appropriate in these circumstances.

[8] In civil cases an adverse inference is normally available in relation to potential witnesses who would have knowledge of relevant facts. This is reflected in the commentary found at para. 6.450 in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: Ont.: LexisNexis Canada, 2014) where it states,

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and who would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[9] I am not prepared to rule out the possibility that in some instances a failure by a party to call an expert witness might properly be the subject of comment by counsel or an adverse inference. For example if a party tells the jury that a certain expert may be called and subsequently fails to do so, this might properly be the subject of comment in a closing. In the Supreme Court of Canada's decision *R. v. Jolivet*, 2000 SCC 29, which is a criminal case, the Supreme Court found that the defence was entitled to comment on the failure by the Crown to call a witness referenced in their opening. The court found this could be the subject of comment by the defence in their closing but did not justify an adverse inference in the criminal context.

[10] If there had been evidence at trial of another expert having assessed the plaintiff there might be an interesting issue as to whether this would justify an adverse inference but that is not the factual situation before me and I do not need to address it in this case. I am not prepared to accept that the facts in this case provide a sufficient basis for an adverse inference where there is no evidence that any other expert was even retained by the defence. Both plaintiff and defence experts in this case were orthopedic surgeons. With respect to the plaintiff's expert, Dr. Olgilvie-Harris was qualified to give opinion evidence about chronic pain syndrome. Dr. Cameron, on the other hand, was limited to giving opinion evidence on chronic pain, but did not hold himself out as an expert in chronic pain syndrome. Dr. Cameron's diagnosis was that the plaintiff displayed evidence of symptom exaggeration.

[11] In coming to its verdict in this case a jury will have to consider the opinions from the two medical experts who were called as witnesses by the parties at this trial. In considering this expert evidence the jury will have to consider the respective qualifications and experience of the two experts, as well as the findings they made on their respective examinations. There is also other evidence before the jury from other witnesses such as the plaintiff herself and family members on the nature and extent of her injuries arising out of the motor vehicle accident. Finally, there is surveillance evidence which the jury will be entitled to consider. In these circumstances I have concluded it is not fair to suggest to the jury that the defence decided not to retain or call another unknown expert because of a belief on the part of the defence that any such expert would ultimately contradict the opinion given by Dr. Cameron.

[12] The unfairness of this inference is also supported by the fact that in his initial report, Dr. Cameron included comments about chronic pain syndrome. The plaintiff objected to Dr. Cameron giving evidence on this issue. Having successfully objected to Dr. Cameron giving evidence about chronic pain syndrome, the plaintiff is now asking the jury to draw an adverse inference from its absence. While I accepted the plaintiff's position that Dr. Cameron was not qualified to give evidence about chronic pain syndrome it is apparent that it was the intention of the defence to lead that evidence from Dr. Cameron and the defence could not reasonably have predicted the outcome of the voir dire with any certainty in advance. There is in my view a fundamental unfairness in suggesting to the jury that the defence probably could not find an expert to contradict the plaintiff's expert when in fact the defence did obtain such an opinion and it was ruled inadmissible based on an objection raised by the plaintiff.

[13] For all these reasons I have concluded that the adverse inference proposed by the plaintiff's solicitor is not appropriate in this case and a correcting instruction must be given to the jury.

Statement that the defence surveillance evidence was an attempt by the defence to pull the wool over the jury's eyes in suggesting that the surveillance is representative of the plaintiff's life

[14] The Ontario Court of Appeal decision in *Landolfi v. Fargione*, 2006 CanLII 9692 (ON CA), sets out the appropriate boundaries for a party's closing jury address. It is well established that considerable latitude is afforded to counsel on the permissible scope of a closing jury address. However, there are important limits. As noted in the *Landolfi* decision, comments to a jury which impede the objective consideration of the evidence by jurors and which encourage assessment based on emotion or irrelevant considerations are objectionable on the basis that they are inflammatory and appeal to the emotions of the jurors, thus inviting prohibited reasoning. If left unchecked, inflammatory comments can undermine both the appearance and reality of trial fairness.

[15] The comments by the plaintiff's solicitor in his closing in my view suggests to the jury that there was a conscious attempt by defence to deceive the jury, thus placing the conduct of the defendant and his counsel on trial. In my view there was no basis for such

a suggestion. The surveillance evidence introduced by the defence at trial was straight forward. During the voir dire on the admissibility of this evidence the plaintiff's counsel acknowledged that what was shown on the video was accurate and that the editing of the video had not been conducted in an unfair manner. The plaintiff argued that his comments to the jury were not meant to infer that there was a conscious intent by the defence to deceive the jury, but were meant to suggest that the surveillance evidence was not reliable as to the overall level of activity of the plaintiff. The plaintiff suggests that its submissions to the jury were in response to the defence assertion that the surveillance was representative to the plaintiff's life. However, I have concluded that whatever the intention of plaintiff's counsel may have been, the inference a reasonable person would draw from his comments is that the introduction of the surveillance evidence was a conscious attempt by the defence to mislead. It directly calls into question the character and truthfulness of defence counsel and requires a correcting instruction to the jury.

Suggestion that the defence was working at all costs to minimize the award and that they had a team of six people on that side of the room attempting to discredit the plaintiff

[16] These comments as well are inappropriate. They suggest that there was a fundamental unfairness at trial because the defence had the benefit of a large team whose purpose was simply to discredit the plaintiff. The natural inference which flows is that the jury should take this alleged unfairness into account during their deliberations. I have concluded that there was no conduct by the defence at this trial which would justify such an allegation and that the comments by plaintiff's counsel were inflammatory in the sense that they appealed to the emotions of the jurors and invited prohibited reasoning. In other words the plaintiff was asking the jury to make its decision not solely based on the evidence but to take into account as well that there was an uneven playing field for the plaintiff during the course of the trial. I have therefore concluded that a correcting instruction on this issue is required.

The plaintiff's comments that the defendant was in the courtroom during the trial even though he did not testify

[17] The jury was told to ask itself why the defendant was in the courtroom during the trial even though he did not testify. These comments suggested to the jury that something inappropriate had been going on during the trial and that there was some ulterior motive by the defence in having their client present in the courtroom. This suggestion is inappropriate. A party to a civil action is entitled to be present during the course of their trial. Nor is there any general requirement on a defendant in a civil trial to be a witness. The suggestion that there's something inappropriate about a party being present during the course of his or her trial or that there is some ulterior motive by the defendant in this case being present at his trial is entirely inappropriate and will be addressed in the correcting instruction to the jury.

Conclusion

[18] For the above reasons I have concluded that the defence objections to the plaintiff's closing do require a correcting instruction to the jury as requested by the defence. The jury will therefore be instructed accordingly.

Justice M. McKelvey

Released: January 22, 2018

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