Hershberg, Richard Ian, Psychiatry

Nemchin v Green, 2017 ONSC 2283 (CanLII), <http://canlii.ca/t/h36jc

[8] The defendant relies extensively on the opinions expressed by Dr. Richard Hershberg, the psychiatrist who conducted a defence medical examination in September 2014. His evidence is discussed in greater detail below.

b) The Plaintiff

[9] The plaintiff's position is that Dr. Hershberg's evidence is lacking in credibility and is not to be accepted. The plaintiff submits that the evidence of the three physicians who testified on behalf of the plaintiff is to be preferred over that of Dr. Hershberg. These physicians (a family physician and two psychiatrists) each expressed the opinion that the collision is the cause of the PTSD and major depression from which the plaintiff was diagnosed following the collision and the symptoms of which she continues to experience.

Analysis

a) Evidence of Dr. Hershberg

[10] In his report prepared following the defence medical examination, Dr. Hershberg did not include a diagnosis of the plaintiff's injuries resulting from the collision. When giving evidence at trial, he acknowledged that it was an oversight on his part not to include a diagnosis in his report.

[11] Dr. Hershberg's evidence at trial with respect to a diagnosis of and cause for the plaintiff's condition was, in summary, as follows:

- He agreed with the diagnosis of PTSD. However, the collision is not the sole contributing factor to the PTSD. A number of other factors, including the pre-existing PTSD, contributed to the symptoms from which the plaintiff suffered following the collision.

- In the period following the collision, what had been believed to be dormant symptoms of PTSD re-emerged, including intrusive thoughts and flashbacks to the historical assaults.

- The symptoms which arose following the collision were an exacerbation of pre-existing PTSD. The exacerbation, to the extent it occurred because of the collision, was not permanent.

- Anxiety related to the motor vehicle collision emerged, including in-vehicle anxiety. However, this anxiety was short-lived and relatively minor. The anxiety resolved, given that the plaintiff was able to resume driving after the collision. The anxiety is neither serious nor disabling.

[12] The defendant asks the Court to accept the evidence of Dr. Hershberg and conclude that the collision is not the cause of the impairments.

[13] For a number of reasons I find that Dr. Hershberg was not a credible witness. I turn first to his substantive evidence with respect to his examination of the plaintiff, the conclusions he reached, and the opinions he expressed. What follows are but a couple of examples, from the substantive portion of Dr. Hershberg's evidence with respect to the diagnosis of the plaintiff's condition, that give rise to my findings on the issue of his credibility.

[14] First, in cross-examination, Dr. Hershberg was taken through five factors upon which he relied in support of his opinion with respect to (a) the cause of the PTSD and (b) the exacerbation of pre-existing PTSD. With respect to each of the five factors, Dr. Hershberg acknowledged one or more of the following:

- He had incomplete information, because he had not fully delved into the particular subject matter;

- His understanding of the facts was inaccurate; and

- The historical information demonstrates that the plaintiff was, prior to the collision, able to handle positions of responsibility.

[15] Second, although Dr. Hershberg acknowledged that the collision was sufficiently significant to be a factor in the exacerbation of the PTSD following the collision, he remained steadfast in his opinion that alternate causes of the exacerbation existed. He identified three alternative causes: 1) the historical assaults; 2) the plaintiff's dissatisfaction with and uncertainty as to her job at the National Capital Commission (the "NCC") at the time of the collision; and 3) the plaintiff's relationship with her fiancé. On cross-examination, Dr. Hershberg admitted the following:

- There was no evidence of any ongoing symptoms of PTSD in the period from 2000 to 2010;

- The plaintiff never said that she was dissatisfied with her job at the NCC or that it was stressful for her that her contract with the NCC might be ending in March 2011.

- He did not have any evidence upon which he based his opinion that the plaintiff's relationship with her fiancé contributed to the re-emergence of the PTSD.

[16] There are other aspects of Dr. Hershberg's evidence which give rise to my finding that he was not a credible witness. In his single-page *curriculum vitae*, Dr. Hershberg identifies as his present status that of "Senior Psychiatrist, 30 years as Consultant to the Neuro-rehabilitation, Musculo-Skeletal, Respiratory Rehabilitation and Long-Term Care Units" at the West Park Hospital ("West Park").

[17] That entry in Dr. Hershberg's *curriculum vitae* leaves the reader with the impression that Dr. Hershberg remains an active member of the professional staff at West Park. When testifying on the *voir dire* with respect to his qualifications, Dr. Hershberg gave no evidence to detract from that impression. His evidence was, "I'm still on staff at West Park Hospital". He did not qualify that statement in any way whatsoever.

[18] On cross-examination, it was drawn to Dr. Hershberg's attention that the website for West Park does not identify him as a physician on staff. In response, Dr. Hershberg testified that he is identified as either a member of either the "consulting staff" or the "associate staff". His evidence was that he is not a member of the active treating staff at West Park. He also testified that he attends at West Park only once every four to six weeks.

[19] On cross-examination, Dr. Hershberg's attention was drawn to the fact that he did not have the correct name of the facility on his *curriculum vitae*. The facility is now called the West Park Health Care Centre. Dr. Hershberg gave no explanation as to why he did not use the correct name of the facility.

[20] I note that Dr. Hershberg's *curriculum vitae* is dated December 2014. I infer from the date of the document that it was produced together with Dr. Hershberg's first report in this action, which is dated December 2014.

[21] Dr. Hershberg testified that for the past five years or so, 80 to 90 per cent of his income has been generated from conducting defence medical examinations – for defendants in litigation or for insurers in responding to claims. He estimated that (a) as of 2014 he did 80 to 90 assessments per year

and (b) in the five years leading up to the date of trial he had done 400 to 500 assessments in total. He charges $600 per hour for his services.

[22] In cross-examination, Dr. Hershberg acknowledged that his *curriculum vitae* does not portray the extent to which he has been doing assessments for the past five or more years.

[23] Dr. Hershberg's experience in conducting assessments includes doing other types of assessments within the motor vehicle insurance system and the Workplace Safety and Insurance context. The majority of the information about Dr. Hershberg's assessment work appears in his *curriculum vitae* under the heading "Ontario Insurance Commission" (the "Commission"). I find that the appearance created by the manner in which that work is described and included in the *curriculum vitae* is that the work is in some way done under the auspices of the Commission. In addition, the manner in which that work is described and is included in the *curriculum vitae* serve to downplay the prevalence in Dr. Hershberg's work of the defence medical examinations and assessments for insurers.

[24] Based on Dr. Hershberg's level of experience in conducting defence medical and other assessments, I draw the following inferences:

- He is aware that his qualifications are not likely to be tested on cross-examination unless and until the dispute proceeds to trial or to an arbitration;

- He knows that a copy of his *curriculum vitae* is provided with his reports when they are served on an opposing party and may be provided to the Court in the course of litigation, the latter including for the purpose of pre-trial conferences;

- He understands that the contents of his report are considered, at least in part, in light of his qualifications and experience as set out in his *curriculum vitae*;

- He is aware that the contents of his report may play a role in the settlement positions adopted by parties to a dispute; and

- He is aware that the contents of his report, including in the light of his experience as detailed in his *curriculum vitae*, may contribute to settlement recommendations made by judges and others presiding over pre-trial and other forms of settlement conferences.

[25] It is troubling to me that Dr. Hershberg, carrying out the type of work that he does and understanding the purpose served by his *curriculum vitae* and reports, is not more careful with respect to the accuracy of and the impression left by the information set out in his *curriculum vitae*.

[26] I am also concerned by the lack of attention to accuracy demonstrated by the manner in which Dr. Hershberg dealt with the mechanics of the collision – both when he interviewed the plaintiff and when giving evidence at trial. Dr. Hershberg testified that he made notes while interviewing the plaintiff. At the end of the day on which the examination was conducted he would, as was his practice, have dictated his report relying at least in part on his notes.

[27] Dr. Hershberg's evidence was that the plaintiff told him that she saw the defendant's vehicle as it was "beginning to drift" into the plaintiff's lane of travel. Dr. Hershberg included that information in his December 2014 report under the heading "Accident Event". In cross-examination, Dr. Hershberg acknowledged that he has nothing in his interview notes to the effect that the defendant's vehicle "drifted" into the plaintiff's lane of travel. He acknowledged that as a result either the report is or his notes are in error; he is unsure as to which of them is in error.

[28] Dr. Hershberg acknowledged that he did not seek clarification from the plaintiff and therefore he does not have all of the details as to how the collision occurred. Yet, he also acknowledged that it was

important to have an understanding of the moments before the collision. Despite the importance of those moments, Dr. Hershberg did not ask the plaintiff how she felt in those moments.

[29] I find that Dr. Hershberg was cavalier in his approach to the requirement to be accurate with respect to his *curriculum vitae*, when obtaining information from the plaintiff during the examination, and in reporting as to the information he obtained from the plaintiff.

[30] For all of the reasons set out above, not only do I find that Dr. Hershberg lacked credibility as a witness, I find that he was not a reliable witness.

[31] Leaving aside the concerns with respect to credibility and reliability, there is the matter of the weight to be given to Dr. Hershberg's evidence. I give Dr. Hershberg's evidence much less weight than the evidence of the other psychiatrists who gave evidence at trial. He was for five years the Head of the Department of Geriatric Psychiatry at the Toronto East General Hospital. His area of practice was never focussed on PTSD. Dr. Hershberg acknowledged that he has not published generally or specifically on the subject of PTSD.

Nkunda-Batware v Zhou, 2016 ONSC 2942 (CanLII), <http://canlii.ca/t/gr53f

[10] There was also conflicting evidence between the two psychiatrists who testified; Dr. Hershberg for the defendant and Dr. Quan for the plaintiff. Dr. Hershberg expressed the opinion that the plaintiff displayed no psychological impairment when he saw her in January of 2014. In particular, she was not clinically depressed at that time. Dr. Quan saw the plaintiff in October of 2014, some nine months later and he very credibly explained that the plaintiff displayed a major depressive disorder (without psychotic symptoms) and a somatic symptom disorder. He recognized that the plaintiff was pre-disposed to depression and that depression and pain disorders can aggravate each other. Dr. Quan was not optimistic about the plaintiff's chances of improvement, although he did acknowledge there was a chance of improvement and potentially a return to sedentary employment with appropriate psychiatric intervention and proper anti-depression medication. I prefer Dr. Quan's evidence to that of Dr. Hershberg principally because Dr. Quan recognized the role of depression in the plaintiff's chronic pain, something that was clearly a major aspect of her ongoing problems.

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Lee and State Farm Date: **2006-02-03**, **Arbitration, Final Decision, appeal pending, FSCO 1850**
https://www5.fsco.gov.on.ca/AD/1850

Dr**. Hershberg's** opinion that the accident did not cause and did not materially contribute to Mrs. Lee's post-accident condition stands alone amongst the numerous health practitioners who assessed her. I accept State Farm's submission that Dr. **Hershberg**'s opinion should be considered in light of the facts and assumptions the report is based on and should not be disregarded merely because he stands alone. While I accept this premise, in order to accept Dr. **Hershberg**'s opinion to the exclusion of the weight of contrary medical evidence, it must withstand close scrutiny. It does not.

Dr. **Hershberg** bases his opinion on pre-existing marital discord together with financial and vocational stress. None of these factors were significantly present in Mrs. Lee's life prior to the accident.

Dr. **Hershberg**'s report bases his opinion on a pre-existing chronic pain disorder. However, he admitted in testimony Mrs. Lee's history would not support such a diagnosis pre-accident.

Dr. **Hershberg** opined that Mrs. Lee had a pre-existing dependence on prescription medications. A review of the DSM IV criteria for dependence and abuse leads to the conclusion Mrs. Lee does not meet those criteria either pre- or post-accident.

In his supplementary report, Dr. **Hershberg** opined that Mrs. Lee had pre-existing passive dependent personality "traits," a condition unrecognized in the DSM IV. However, it does set out criteria for a dependent personality disorder. I prefer and accept Dr. van Reekum's opinion that Mrs. Lee did not have a dependent personality disorder either before or after the accident.

Dr. **Hershberg**'s opinion is based on inaccurate facts, unsupportable diagnoses and makes reference to conditions which are not accepted psychiatric disorders. His reports and evidence in respect of his opinion are therefore fatally flawed. I therefore prefer and accept the opinions of Mrs. Lee's treating doctors, Dr. Yip, Dr. Shulman and Dr. Wallani and the assessment of Dr. van Reekum that the accident was the cause of Mrs. Lee's post-accident condition.

Alper and State Farm Decision Date: **2012-01-09Arbitration, Preliminary Issue, FSCO 158**
https://www5.fsco.gov.on.ca/AD/158

The reason for Ms. Alper's marked psychological impairment is disputed. State Farm asserts, based on the medical opinions of Drs. **Hershberg**, psychiatrist, and Zakzanis, psychologist, that Ms. Alper's psychological and physical presentation are not as a result of the accident but rather (i) a manifestation of malingering, a deliberate attempt to convey symptoms worse than reality for some conscious secondary gain, or (ii) a manifestation of factitious disorder, a condition where the subject consciously misrepresents so that unconscious dependency needs are met.

I find that Ms. Alper's current mental or behavioural disorder is a direct result of the accident, there being no evidence of a similar pre-existing condition, and there being insufficient evidence upon which to find that she is currently malingering, feigning or suffering from factitious disorder.

[]

(v) **Ms. Alper's current presentation is not explained by malingering, feigning or factitious disorder**

In the same way that the evidence does not support a finding that Ms. Alper's improvement, followed by deterioration, is an indication that she is malingering or exaggerating her presentation, there is not enough persuasive evidence that Ms. Alper's current presentation is explained more generally by malingering.

While both Drs. **Hershberg** and Zakzanis opined that Ms. Alper's presentation was not indicative of her true abilities, I find that there is insufficient evidence to support their conclusions that she has factitious disorder, is malingering or is feigning symptoms. Furthermore, I find that her case history and the preponderance of the other evidence support a finding that the accident and its consequences materially contributed to her current limitations and presentation.

Drs. **Hershberg** and Zakzanis questioned the accident as the reason for Ms. Alper's presentation, relying heavily on Ms. Alper's test results and her general performance in psychological testing. I find, however, that their own opinions recognize that there could be multiple explanations for Ms. Alper's presentation including the accident and its consequences.

For example, Dr. **Hershberg** agreed that there is depression and, to some extent, vehicular anxiety present with Ms. Alper in part due to the injuries sustained in the accident. Dr. Zakzanis also recognized a host of contributing factors in Ms. Alper's presentation:

Nandkumar and Economical Mutual Decision Date: **2004-10-20**, **Arbitration, Final Decision, FSCO 2374** **https://www5.fsco.gov.on.ca/AD/2374**

On the other hand, Dr. **Hershberg** appears to accept Mrs. Nandkumar's presentation as accurate, but opines that her condition is not accident related because it is a reaction to the accident, caused by pre-accident, "likely unconscious" factors. That opinion does not support a finding that Mrs. Nandkumar's condition is not "as a result of...the accident" as set out in subsection 7(1) of the *Schedule.*

The question is one of legal, not medical causation. To find legal causation, I must be satisfied that but for the accident Mrs. Nandkumar's condition would not have arisen. [See note 20 below.] To the extent that Dr. **Hershberg**'s opinion is that Mrs. Nandkumar's condition is an accurately portrayed, unconscious reaction to symptoms from the accident, his opinion supports a finding her condition was caused by the accident. By his logic, because of the accident, with no conscious intervening act, she has developed her present symptoms.

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Note 20: See *Athey v. Leonati,* [1996] 3 S.C.R. 458, at para.14

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Dr. **Hershberg** also appears to state that Mrs. Nandkumar's presentation may be false, because of "the claimant's objective presentation today and on various earlier evaluations compared with what was observed on the videotapes." As stated above, I do not accept that the presentation is false. I therefore do not accept Dr. **Hershberg**'s opinion where it relies on that assumption.

I also do not find it reasonable to conclude, as Dr. **Hershberg** did, that " longstanding characterological factors and associated psychosocial stressors seem to be playing the major role in perpetuating her...Symptom Magnification Syndrome." Such a conclusion appears to me to be at best speculation, when Mrs. Nandkumar was functioning before the accident, had no history of psychiatric illness as certified by Dr. Chen, and the conclusion is based on a history taken from Mr. Nandkumar that repeats the same complaints of stress for which Mrs. Nandkumar had occasionally consulted Dr. Chen.

Doctors Koepfler and **Hershberg** also doubted the reliability of earlier diagnoses on three principal grounds:

1. Lack of early report of symptoms consistent with brain injury or post traumatic syndrome.

2. No objective evidence of a brain injury.

3. Regression rather than recovery.

I will address each in turn.

Lack of early report of symptoms

Dr. **Hershberg** agreed with Dr. van Reekum's evidence that it is not unusual that a brain injured person will not report symptoms of brain injury in the early stages of treatment, when the emphasis is on pain relief. Therefore, lack of early report of symptoms is not indicative of the absence of a brain injury.

In any event, I do not accept that symptoms consistent with a brain injury were not reported early. There is no dispute that Mrs. Nandkumar suffered a blow to her head in the accident. It was the swelling to her face that was the cause of alarm the next day and the reason to seek medical attention. When Dr. Chen first saw her, he found tenderness on the right side of the skull. Although she did not wander into traffic at the scene of the accident, it has been consistently reported that she was confused. On December 1, 1995, she apparently told Dr. Nada-Rajah that she was the driver of the car. As Dr. Rossiter-Thornton noted, this may be an early instance of the loss of cognitive function, more significant instances of which are later documented. When she saw Dr. Glatter on December 6, 1995 she reported headaches, dizziness, blurred vision and tinnitus in the right ear, all symptoms consistent with a brain injury.

I therefore do not accept that there was no early report of symptoms consistent with a brain injury.

It is more accurate to say that there was no early diagnosis of a brain injury.

No objective evidence of brain injury

Doctors van Reekum and Rossiter-Thornton agreed that the results of the various imaging investigations that Mrs. Nandkumar has undergone do not rule out a brain injury. Certainly, the results did not rule out a diagnosis of brain injury for Mrs. Nandkumar's treating physicians. Doctors van Reekum and Rossiter-Thornton explained their opinions as I summarized above.
Dr. **Hershberg** disagreed but gave no explanation for the basis of his disagreement and gave no insight into why the contradictory opinions were not well founded. In the circumstances, I prefer the opinions of Doctors van Reekum and Rossiter-Thornton because of their greater experience in the treatment of patients with acquired brain injuries and clear explanation of the basis of their opinions. I find that the test results do not rule out the diagnosis of brain injury.

B.P. and Primmum Decision Date: **2006-12-26**, **Arbitration, Final Decision, FSCO 280** **https://www5.fsco.gov.on.ca/AD/280**

- *Dr. Hershberg*

At the request of B.P.'s counsel, Dr. R. Hershberg, a psychiatrist, conducted a paper review. Based solely on Dr. Doxy's report, Dr. Hershberg places B.P. as having a Class 3 Mental and Behavioural Impairment. Class 3 is defined as moderate impairment, that is, impairment levels are compatible with some but not all useful functioning with regard to activities of daily living, social functioning, concentration and adaption.

Dr. Hershberg notes that while B.P. was relatively independent with respect to his activities of daily living and was able to carry on with many aspects of his former vocational duties, he was quite limited regarding social and recreational activity. Dr. Hershberg was of the view that the appropriate WPI rating was 20 to 25%.

A major weakness of Dr. Hershberg's opinion, like that of Dr. Lipson, is that he never saw B.P. As well, his opinion is based on Dr. Doxy's assessment in early 2005, when Dr. Doxy indicates that there may have been an improvement in the Applicant's condition when seen by Dr. Tafler in September 2005.

L.F. and State Farm Decision Date: **2002-08-21**, **Arbitration, Final Decision, appeal rendered, FSCO 1774** **https://www5.fsco.gov.on.ca/AD/1774**

I have found above that State Farm unreasonably withheld payment of attendant care benefits, upon receipt of Ms. Lai's Form 1 in 1998, and certainly no later than receipt of Ms. Poon's report early the next year. As noted above, I find that the Insurer's failure to properly assist L.F. in applying for benefits to which he was entitled, mitigates against technical defences raised by State Farm noted above, but does not provide a separate basis for a special award.

(i) State Farm's stated reason for refusing the December 1999 Rosedale Treatment Plan

L.F. submits that it was unreasonable for the Insurer to deny the initial Rosedale treatment plan on the basis of the reports of Dr. Ford and Dr. **Hershberg**. I agree.

Neither doctor commented on this treatment, for the simple reason that their reports preceded State Farm's receipt of the Rosedale plan. In any event, I am not persuaded as to the expertise of Dr. **Hershberg**, a psychiatrist, to comment on the reasonable necessity of active rehabilitation, physiotherapy, chiropractic care, massage therapy and behavioural therapy.
