

SUPERIOR COURT OF JUSTICE
CIVIL COURT

B E T W E E N :

KYRIAKI MOUSTAKIS

Plaintiff

- v. -

REYNALDO AGBUYA

Defendant

R U L I N G O N V O I R D I R E

BEFORE THE HONOURABLE JUSTICE L. MERRITT with a Jury
on October 17, 2023, at 330 University Avenue, Toronto, Ontario

APPEARANCES:

D. Dick

Counsel for Kyriaki Moustakis

V. Yang

Counsel for Kyriaki Moustakis

V. Tanner

Counsel for Reynaldo Agbuya

A. Chau

Counsel for Reynaldo Agbuya

(i)
Table of Contents

WITNESSES

Name	Exam in- Ch	Cr-Ex	Re-Ex

5

EXHIBITS

Number	Description	Page No.

10

LEGEND

(sic) Indicates preceding word has been reproduced verbatim and is not a transcription error

(ph) Indicates preceding word has been spelled phonetically

(indiscernible) Indicates repeated efforts to decipher what was said without success

. . . Indicates interruption

-- Indicates interruption and/or incomplete thought

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Transcript ordered: October 18, 2023

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Transcript completed: October 21, 2023

Ordering party notified: October , 2023

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TUESDAY, OCTOBER 17, 2023

RULING ON VOIR DIRE

MERRITT, J. (Orally):

5 The defendant has tendered Dr. Michael Ford as a
litigation expert. Dr. Ford has provided reports
and signed a Form 53.

10 As I have said in my rulings on the other *voir*
*dire*s relating to the qualification of expert
witnesses when considering the admissibility of
expert evidence, the starting point is the *Mohan*
test of relevance, necessity, absence of an
exclusionary role, and a properly qualified expert.

15 The second stage requires me to conduct a cost-
benefit analysis to determine whether otherwise
admissible expert evidence should be excluded
because its probative value is outweighed by its
prejudicial effect. The gatekeeper inquiry. This
20 involves balancing the risk and benefits of
admitting the evidence or balancing the relevance,
reliability and necessity against the consumption
of time prejudice and confusion. Is the evidence
beneficial enough to warrant admission despite the
25 potential harms? In this case there is no
exclusionary rule, but I do have concerns about the
remaining three branches of the test.

30 The defendant asked me to qualify Dr. Ford as an
orthopedic surgeon with experience in chronic pain
and somatic symptom disorder; and the diagnosis,

prognosis, causation and impairments relating to functionality and employment, particularly as it relates to Cindy Moustakis and the motor vehicle accident of January 9th, 2016.

The plaintiff submits that Dr. Ford is biased and I should not qualify him as part of my gatekeeping function because the cost of admitting his evidence outweighs its probative value.

White v. Burgess stands for the proposition that a lack of independence and impartiality can go to the admissibility of the evidence. Impartiality is best addressed as part of the qualified expert or fourth part of the *Mohan* test.

In addition to the common law requirements, litigation experts have a duty to provide impartial evidence under sub rules 4.1.01(1) and sub (2). The duty to the court overrides the obligation to the party calling them. If the expert is unwilling or unable to fulfill that duty they are not qualified and should be excluded. Once the expert attests or testified to recognizing the duty, the burden shifts to the party seeking to exclude the expert evidence. It is rare to exclude expert evidence on that basis. Examples include where exclusion would be inappropriate are where the expert has a direct financial interest, close familiar relationship, exposure to professional liability if the opinion is rejected, or the expert has assumed the role of an advocate. I should only

exclude at the threshold stage in a clear case where the expert is unwilling or unable to provide fair objective non-partisan evidence.

5 Dr. Ford said in the *voir dire* that his experience with chronic pain syndrome relates to decisions of whether to do surgery and potential post-surgical outcomes. There is no issue of surgery in this case.

10 In this case I find that Dr. Ford has gone outside his expertise and assumed the role of an advocate in his reports. I also find that when balancing the relevance, reliability and necessity of his evidence against the consumption of time, prejudice and confusion, the cost of admitting his evidence outweighs its probative value.

15 As the court has set out many times, there is always a risk that a jury will inappropriately defer to an expert's opinion rather than carefully weigh it.

20 As set out in the *Parliament* case and others, the ultimate conclusion as to the credibility or truthfulness of a witness is for the jury and is not the proper subject of expert opinion. The rationale for this policy is that credibility is a notoriously difficult problem, and a frustrated jury may rely on an expert's opinion as a convenient basis upon which to resolve its difficulties.

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In this case both of Dr. Ford's reports show his willingness to go beyond his expertise and his answers in re-examination on the *voir dire* concerning malingered pain syndrome is an example of Dr. Ford's willingness to venture into an area where no other experts, either plaintiff or defence, have gone. This is beyond his stated experience and constitutes a challenge to the plaintiff's credibility. In several places in his reports, he ventures into this topic.

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For example, at page 7 of his report, Dr. Ford cites a study relating to rotator cuff injuries and says that..

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Evidence is demonstrated, the symptoms associated with minor shoulder pathology are more closely related to depression than pathology severity.

On the same page he says..

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The science has clearly shown that persistent symptomology after a minor traumatic event associated with compensation/litigation issues is psycho-socioeconomic and not organically based.

He says..

Expanding symptomology is not uncommon for litigants. It's known as BUILD-UP.

He cites an article in the Journal of Risk and Insurance on fraud detection.

On the *voir dire* he was unable to say whether this journal is peer reviewed. However, he does say in his report that...

This paper describes the prevalence of this phenomenon and that 25 to 75 percent of insurance claimants show some evidence of fraud or BUILD-UP.

He says...

This phenomenon cannot be discounted.

He goes on to say...

This potential reason for Cindy's expanding complaints and ongoing report of disability for six and a half years after a minor accident cannot be explained on any basis other than a psychiatric conversion disorder.

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Dr. Ford is not a psychiatrist, nor a psychologist,
and he is not qualified to make this diagnosis. He
seems to acknowledge this in the next sentence of
his report where he says...

I will leave this diagnosis up to
the psychiatrists and
psychologists.

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But he doesn't leave it there. He goes on to say...

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This diagnosis, however, would be a
diagnosis of exclusion after BUILD-
UP has been definitively excluded.

He says...

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He is not too sure how that would
be done.

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Again, he is opining on matters outside the area of
his expertise. I note that none of the other
experts who are properly qualified to make such a
diagnosis have done so.

Dr. Ford also says at page 8 of his report that...

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Not surprisingly, the pedestrians
who are at fault recovered as per
expectations. Those involved in
compensation litigation issues had

significantly poorer outcomes with
no organic explanation.

Dr. Ford says...

This is in keeping with the
literature demonstrating that
compensation significantly
negatively affects outcomes, and
studies demonstrate this negative
relationship between outcome and
compensation.

As I said before, no other experts, plaintiff or
defence, have gone down this road. The idea that
Cindy has a psychiatric conversion disorder or is
being fraudulent, or having BUILD-UP has not been
canvassed by the defence psychiatrist Dr. Ross, who
is better qualified to opine on such matters.

At page 9 of his report Dr. Ford says that...

Eliminating compensation has been
demonstrated to improve outcomes
and any claim that Cindy's
prognosis is poor or guarded is not
based on any objective parameters.

Again, he is commenting on the prognosis of the
psychiatrists.

In his conclusion Dr. Ford says...

Cindy's ongoing complaints cannot
be explained on an organic basis.

5 That is within his expertise, but he goes on to
say...

10 Cindy's ongoing complaints are
either secondary to BUILD-UP or
some other psychiatric condition.

15 The idea of BUILD-UP and a diagnosis of psychiatric
conversion disorder is outside Dr. Ford's area of
expertise and is designed to challenge the
plaintiff's credibility, as are the references to
insurance fraud.

20 As in the *Bruff-Murphy*, case the whole tone of the
report is a liable predictor of Dr. Ford's
testimony. He goes out of his way to make points
that are clearly meant to challenge Cindy's
credibility. He goes beyond a mere lack of
independence and appears to have adopted the role
of advocate for the defence.

25 The defence concedes that Dr. Ford cannot diagnose
chronic pain syndrome, now known as somatic symptom
disorder. Ms. Tanner agreed to remove that for the
opinions for which she sought to qualify Dr. Ford.

30 Given that the main issue in this case is whether
Cindy has a somatic pain disorder, a major

depressive disorder, and post-traumatic stress disorder symptoms and what damages flow from those conditions, I find that Dr. Ford's evidence is not sufficiently relevant or necessary. I find that his evidence is too prejudicial and not sufficiently probative.

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