SUPREME COURT OF YUKON

Citation: *M.S.Z.* v. *Dr. M.,* 2008 YKSC 74

Date: 20081001
S.C. No. 06-A0096
Registry: Whitehorse

Between:

M.S.Z.

Plaintiff

And

DR. M.

Defendant

Before: Mr. Justice L. F. Gower

Appearances:

Susan Roothman and André Roothman — Counsel for the Plaintiff
Nigel L. Trevethan — Counsel for the Defendant

REASONS FOR JUDGMENT
Voir Dire

INTRODUCTION

[1] Counsel for the plaintiff, Ms. Z., objected to the admissibility of expert evidence proffered by counsel for the defendant, Dr. M. The evidence is in the form of reports and testimony from each of Dr. Peter von Dadelszen and Dr. M. Lynn Simpson, both put forward as experts in obstetrics and gynaecology. Each expert was asked to opine on the adequacy of Dr. M.'s discussion with Ms. Z. prior to performing a tubal ligation upon her. The main objection to this evidence by the plaintiff's counsel is that it is not relevant.

[2] After hearing submissions on the v*oir dire*, I ruled the evidence admissible, but due to time constraints, I indicated that my written reasons would follow.

BACKGROUND

[3] In this trial, the plaintiff alleges that Dr. M. performed a tubal ligation upon her, without her consent, at the same time as a Caesarean section for her fourth pregnancy. Dr. M. says that he obtained the plaintiff's verbal consent for the tubal ligation immediately prior to the Caesarean section operation on December 30, 2002, and also during two earlier appointments with the plaintiff to consult with her about the fourth pregnancy.

[4] In preparation for their respective reports, Dr. M.'s counsel provided each doctor with copies of the pleadings, copies of specifically identified medical records, and the examination for discovery transcripts of each of the parties. In addition, each expert was supplied with a Statement of Assumed Facts, which was filed with the Court on the v*oir dire*, and has also been incorporated into the report of Dr. Simpson.

[5] Dr. M.'s counsel asked each of the experts four questions:

> "1. Was there adequate discussion with regard to the consent prior to the tubal ligation performed by Dr. M.? Please elaborate.
>
> 2. Was the tubal ligation indicated in the circumstances? Please elaborate.
>
> 3. What would the likely outcome have been for both the Plaintiff and the child, had the Plaintiff gone on to a further pregnancy?
>
> 4. In your opinion, what is the likely outcome of a reversal of the tubal ligation and is this indicated in a patient with this obstetric history? Please elaborate."

[6] Both counsel agree the leading case on the admissibility of expert opinion evidence is *R.* v. *Mohan*, [1994] 2 S.C.R. 9. That case sets out four criteria for the admission of such evidence:

1. Relevance;
2. Necessity in assisting the trier of fact;
3. The absence of any exclusionary rule; and
4. A properly qualified expert.

ANALYSIS

[7] As I said, the principal objection of the plaintiff's counsel relates to the criteria of relevance. It is jointly acknowledged that the analysis of relevance in this context involves two points. First, the evidence must be logically relevant, in the sense that it is sufficiently related to a fact in issue that it tends to establish that fact. Second, the evidence must be assessed on a cost benefit analysis. Here, the Supreme Court of Canada in *Mohan* said, at para. 18:

> "…Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability..."

[8] At para. 19, the Supreme Court adopted a threshold test for relevance in deciding whether scientific evidence ought to be accepted;

1. Is the evidence likely to assist the jury in its fact finding mission, or is it likely to confuse and confound the jury?

2. Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

Further, at para. 22 of *Mohan*, the Court stated that what is required is that the opinion be necessary in the sense that it provides information "which is likely to be outside the experience and knowledge of a judge or jury."

[9] The plaintiff's counsel firstly objected that neither of the experts personally examined Ms. Z., as if that was a pre-condition to the admissibility of the evidence, however she provided no case law in support of this proposition. *Rule* 40A(5)(b) authorizes an expert opinion in the form of a statement which sets out the facts and assumptions upon which the opinion is based. That has been done by each of Drs. von Dadelszen and Simpson. While it may well be preferable that an expert personally interview the subject of the expert opinion, depending on the factual context and/or the issues involved, it is not a condition precedent for the opinion to be admissible. Therefore, I reject the plaintiff's argument on this point.

[10] Secondly, the plaintiff's counsel submitted that what other doctors do in their practices is not relevant to this Court's determination of valid consent and that the expert reports do not introduce any scientific knowledge on this issue. I will answer this point below.

[11] Thirdly, the plaintiff's counsel submitted that what is at issue in this case is whether Ms. Z. provided a "valid consent" to the tubal ligation. She further submitted on this *voir dire* that such a consent requires proof by Dr. M. that he explained the procedures involved in a tubal ligation; the different methods by which a tubal ligation can

be done; the risks of these various procedures; the other options of birth control besides a tubal ligation; and that Ms. Z. understood all of this information. In support of that proposition, the plaintiff's counsel relied on s. 5 of the *Care Consent Act*, S.Y. 2003, c. 21, which states:

> "A person consents to care if
> (a) the consent relates to the proposed care;
> (b) the consent is given voluntarily;
> (c) the consent is not obtained by fraud or misrepresentation;
> (d) the person is capable of making a decision about whether to give or refuse consent to the proposed care;
> (e) the person is given the information a reasonable person would require to understand the proposed care and to make a decision, including information about
> (i) the reason or reasons why the care is proposed,
> (ii) the nature of the proposed care,
> (iii) the risks and benefits of receiving and not receiving the proposed care that a reasonable person would expect to be told about, and
> (iv) alternative courses of care; and
> (f) the person has an opportunity to ask questions and receive answers about the proposed care and the alternatives."

[12] The notion that Dr. M. is required to prove that he explained all this information to Ms. Z. would suggest that the plaintiff is raising the lack of "informed consent" as an issue in this trial: *Reibl* v.*Hughes*, [1980] 2 S.C.R. 880. As I have also indicated in my reasons for judgment following the trial (*M.S.Z.* v. *Dr. M.,* 2008 YKSC 73), there seems to have been some fundamental confusion on the part of the plaintiff's counsel as to whether or how "informed consent" is at play in this case. The plaintiff's counsel

submitted that it is, but not necessarily in the sense it is ordinarily employed in medical negligence cases.

[13] This confusion is evident in a letter to the defendant's counsel, in which I understand that the plaintiff's counsel stated that she objected to the admission of the expert reports on four grounds. The first ground was that the expert opinions are irrelevant, in that the plaintiff has not claimed lack of informed consent. However, on this *voir dire*, the plaintiff's counsel submitted that there was an onus on Dr. M. to prove informed consent. She then submitted that informed consent is part of valid consent.

[14] I will try to address these confusing submissions as best I can. First, s. 5 of the *Care Consent Act* can have no application to this trial, as it was not proclaimed in force until April 29, 2005, long after the operation on December 30, 2002, and it does not have retroactive effect. Second, at the point in the trial when the vo*ir dire* was held, it still appeared uncertain as to whether the plaintiff was intending to argue that Dr. M. was required to prove some type of "informed consent" analogous to that commonly relied upon in the defence of medical negligence actions. That in turn would have potentially involved a determination of the standard of care of the normally prudent physician. The evidence of the two experts is potentially relevant to that determination and would not involve an inordinate amount of time or otherwise have an adverse impact on the trial process.

[15] Even if there is no requirement on Dr. M. to prove informed consent, the consent which he must prove in defence to a claim of medical battery could give rise to a number of ancillary questions, the answers to which are likely outside my experience and knowledge as a trial judge. For example:

- Is a verbal consent acceptable generally in medical practice?
- Is a verbal consent acceptable in these particular circumstances?
- Is it standard obstetrical practice to confirm a consent just prior to the procedure?
- Is it normal to do a pre-operative note describing the consent?
- Was it unusual obstetrical practice to proceed with a tubal ligation without a written consent in these circumstances?

In my view, the answers of the expert doctors to each of these questions would be logically relevant and would not inordinately delay the trial or have an adverse effect on the trial process.

[16] The plaintiff's counsel referred to the second and third questions posed by Dr. M.'s counsel to each of the experts as relating to a risk analysis. Further, she submitted that this must relate, in turn, to the defence pled by Dr. M., in the alternative, that if the plaintiff was not adequately warned as to the risks and benefits associated with the medical treatment, a reasonable person in her position would nevertheless have consented if all the risks and benefits of the treatment were known to her. Such a defence is only relevant in the context of a claim of medical negligence, which the plaintiff's counsel says she is not making here (and would be statute barred in any event). Nevertheless, given the apparent confusion over the extent to which the plaintiff intends to argue the issue of informed consent, I can understand why Dr. M. pled this defence in the alternative, if only out of an abundance of caution.

[17] It should also be kept in mind that the plaintiff is claiming that her cause of action is properly one of "sexual assault", as that term appears in s. 2(3)(b) of the *Limitation of Actions Act*. Nevertheless, it is not clear from either the plaintiff's counsel's pleadings or her trial brief as to whether she says there is a necessity for Dr. M. to prove some form of informed consent in defence to a claim of sexual assault. Once again, in my view, the answers of the two expert doctors to the second and third questions posed, by Dr. M.'s counsel would seem to be logically relevant and would not unduly delay the trial or adversely effect the trial process.

[18] Dr. M.'s counsel also anticipates that the plaintiff may raise the issue of whether she was capable of consenting to the tubal ligation, given that she was in active labour and experiencing pain under stressful conditions. As a result, I agree that expert evidence as to whether Ms. Z. could provide, or confirm, consent just prior to the Caesarean section is both relevant and necessary. *Ciarariello* v. *Schacter* [1993] 2 S.C.R. 119, dealt with a similar issue as to whether or not consent had been withdrawn during the course of the medical procedure. Cory J., speaking for the Supreme Court, said at para. 43:

> "The issue as to whether or not a consent has been withdrawn during the course of a procedure may require the trial judge to make difficult findings of fact. If sedatives or other medication were administered to the patient then it must be determined if the patient was so sedated or so affected by the medication that consent to the procedure could not effectively have been withdrawn. <u>The question whether a patient is capable of withdrawing consent will depend on the circumstances of each case. Expert medical evidence will undoubtedly be relevant, but it will not necessarily be determinative of the issue</u>…" (my emphasis)

[19] Ms. Z.'s counsel also objected to the admissibility of the expert evidence on the basis that such evidence would usurp the function of the court. This is also known as the

"ultimate issue" rule. The short response to that objection is that the ultimate issue rule has been denounced by the Supreme Court of Canada in *R.* v. *Graat*, [1982] 2 S.C.R. 819, where Dickson J., as he then was, speaking for the Court, quoted Professor Wigmore, who was commenting on whether a witness should be able to provide an opinion on the "very issue before the jury", pp. 833-834:

> "The fallacy of this doctrine is, of course, that, measured by the principle, it is both too narrow and too broad. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other tha[n] the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle…" (my emphasis)

[20] And later, Dickson J. agreed with Professor Cross, at pp.836-837, who stated:

> "The exclusion of opinion evidence on the ultimate issue can easily become something of a fetish."

[21] In his conclusion, at p. 836, Dickson J. stated:

> "As for other considerations such as "usurping the functions of the jury" and, to the extent that it may be regarded as a separate consideration, "opinion on the very issue before the jury", Wigmore has gone a long way toward establishing that rejection of opinion evidence on either of these grounds is unsound historically and in principle."

[22] In any event, the expert opinions sought from Drs. von Dadelszen and Simpson in answer to the first question posed by Dr. M.'s counsel would not go to the ultimate issue. They are simply expressing opinions based on certain assumed facts. Whether or not Ms. Z. provided her consent is a matter of credibility which will still require an assessment of all the relevant evidence. The proffered expert opinion does not go

directly to the credibility of the parties, but rather assists by providing scientific information about the medical standards and the nature of the tubal ligation procedure, as that relates to the adequacy of consent discussions in the medical profession, which are outside the expertise and experience of this Court.

[23] Although she did not argue the point on the v*oir dire*, the letter Ms. Z.'s counsel wrote to Dr. M.'s counsel prior to trial also stated that one of her reasons for objecting to the expert opinion evidence was that it was based on the examination for discovery evidence of Dr. M. Once again, this objection can be disposed of shortly. Brenner C.J., in *Blackwater* v. *Plint*, (unreported) August 14, 2000, Vancouver Registry No. A960336 (B.C.S.C.), clearly held, in my view, that it is entirely appropriate for an expert to refer to examination for discovery evidence in forming an expert opinion, providing that the opposite party knows what was relied upon as the basis for the opinion. Of course, if the facts proven at trial are different from those relied upon by the expert, then that will go to the weight of the expert's opinion: see also *Benek* v. *Pugash*, 2004 BCSC 1257.

[24] Finally, in her pre-trial letter to Dr. M.'s counsel, Ms. Z.'s counsel objected to the opinion of Dr. von Dadelszen, as it was based in part on a number of journal articles referenced in a list appended to his report. In *ter Neuzen* v. *Korn*, [1996] B.C.J. No. 2245 (B.C.S.C.), Bouck J. easily answered this concern at para. 20, where he said:

> "There is no doubt that an expert can rely on text books, learned articles and the like in support of his or her opinion. Expert witnesses may state in their direct examination that they base their opinion partly upon their own experience and partly upon the opinions of text writers. They may name the text writers and they may add their opinion accords with that of the text writer. But it is the opinion of the expert on the performance of the defendant that matters, not just the opinion of text writers generally: *R.* v. *Anderson* (1914), 22 C.C.C. 455 at 476 (Alta C.A.)." (my emphasis)

[25] Dr. M.'s counsel concedes that the third and fourth questions he posed to the experts and part of the second question go to the issue of damages. The plaintiff has claimed compensatory damages, which are intended to place her in the position she would have been in, had the alleged tort not been committed. The plaintiff has also claimed special damages, which presumably relate to her intention to have the tubal ligation reversed. It seems to me that the expert doctors would be able to provide scientific evidence about the possibility of the plaintiff having a successful reversal of the tubal ligation and also the possibility of a further successful pregnancy, and thus would be relevant to the potential damages suffered by the plaintiff. Such scientific information is beyond the expertise of this Court and would not unduly delay the trial or adversely effect the trial process.

CONCLUSION

[26] For these reasons, I find that all of the plaintiff's objections to the proffered expert opinions are unfounded. Accordingly, I admitted the reports of each of Drs. von Dadelszen and Simpson into evidence and the doctors were allowed to testify about those reports, subject of course to each of them being properly qualified as experts in their field.

Gower J.