IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20171024
Docket: S147988
Registry: Vancouver

Between:

Level One Construction Ltd. and Randy Kautzman

Plaintiffs

And

Marla Burnham, Canadian Broadcasting Corporation, Eric Rankin, Jenni Sheppard, Wayne Williams, Chris Foe, Chris Poe, Kim Yoe, Chris Sloe, Kim Loe, John Doe and Richard Roe

Defendants

Before: The Honourable Madam Justice Sharma

Oral Reasons for Ruling on the Admissibility of the Report of John Miller dated November 2, 2016

Counsel for Plaintiffs:	R.A. McConchie
Counsel for Defendant Marla Burnham:	C.V. Morcom J. Gill
Counsel for Defendants CBC, Eric Rankin, Jenni Sheppard, and Wayne Williams:	D.T. McKnight T. Hoogstraten
Place and Date of Trial/Hearing:	Vancouver, B.C. October 23, 2017
Place and Date of Judgment:	Vancouver, B.C. October 24, 2017

[1] **THE COURT:** These are my reasons on a *voir dire* that was conducted yesterday about the admissibility of the expert report of John Miller dated November 2, 2016, which the plaintiffs intend to introduce during the trial. The defendants, Canadian Broadcasting Corporation, Eric Rankin, Jenni Sheppard and Wayne Williams (the "CBC defendants") object to its admissibility.

[2] To put these reasons into context, the plaintiffs in this case sue the defendants for defamation. The plaintiff Level One Construction Ltd. (Level One), is a construction company, and the plaintiff Randy Kautzman is its principal.

[3] Level One had a contract with the defendant Marla Burnham. A dispute arose between them about that contract, specifically whether Ms. Burnham was entitled to a refund of any portion of a $5,000 deposit she paid. Ms. Burnham filed an action in Small Claims Court on January 2, 2014, seeking a return of the whole deposit. On February 12, 2014, Level One filed a reply to that action.

[4] On January 20, 2014, Ms. Burnham contacted the CBC about her dispute with Level One at an email address for the network's investigative and enterprise unit. Her email was forwarded to Mr. Rankin on February 11, 2014.

[5] Mr. Rankin works for the CBC. He is a reporter and producer for a feature called *CBC Investigates*. In that capacity he contacted Ms. Burnham by phone on February 12 and interviewed her at her home later the same day. The plaintiffs allege that during that interview Ms. Burnham made defamatory statements about them.

[6] Two days later, on February 14, the CBC broadcast on TV a report about Ms. Burnham's dispute with Level One. On the same day, it also posted on its website a summary of that report and a link to the video broadcast. The plaintiffs allege those publications constitute defamation.

[7] The amended notice of civil claim was filed December 1, 2016, and it sets out the particulars of the alleged publications and defamatory statements. The defendants filed responses to the original notice of civil claim in November 2014.

[8] Among the defences raised by the CBC defendants to this claim is the defence of responsible communication. The test for that defence was formulated by the Supreme Court of Canada in *Grant v. Torstar*, 2009 SCC 61. Distilled to its basics, the test requires a defendant to establish that the publication was about a matter of public interest. This is conceded in this case. The defendant must also establish that the publication was responsible in that the publisher was diligent in trying to verify allegations having regard to the relevant circumstances.

[9] To assess whether the publisher was diligent in verifying allegations, the Supreme Court of Canada identified some relevant factors to consider: the seriousness of the allegations; the importance to the public of the matter being the subject to the allegedly defamatory publication; the urgency of the need to publish; the status and liability of the source; whether the plaintiffs' side of the story was sought and accurately reported; whether inclusion of the defamatory statement was justifiable; and whether the public interest in the matter was the fact that it was made rather than its truth.

[10] The Supreme Court of Canada stated that the list of factors is not exhaustive and not all factors are necessarily weighed equally. Also, other factors can be considered, and a few examples are given by the Court, such as the tone of the article and whether it can convey more than one meaning, and if so, whether the defendants' intended meaning was relevant. The plaintiffs' position is that the CBC defendants cannot meet the test for responsible communication and in support of that position, they rely on Mr. Miller's report.

[11] Mr. Miller is a former award-winning reporter, former newsroom editor, and former senior professor at Ryerson University School of Journalism. He was a member of the Ontario Press Council. He has judged competitions for journalistic excellence and wrote a book about the practice of newspaper journalism.

[12] In addition to reviewing the material provided to him by counsel, Mr. Miller refers to the CBC Journalistic Standards and Practices, the Canadian Press' Editorial Values as published on its website, the Canadian Association of Journalists

Ethics Guidelines, the *Toronto Star* Newsroom Policy and Journalistic Standards Guide, a textbook about the core values of journalism, and the UNESCO training manual for investigative journalism.

[13] In the letter of instruction, Mr. Miller was asked to opine on four issues: (i) whether the alleged defamatory publications were on a matter of public interest, and as I have noted, my understanding is that the plaintiffs concede this point; (ii) what are the recognized established practices of a competent professional journalist in the circumstances of this case; (iii) whether the CBC defendants complied with those practices, and (iv) whether the CBC defendants responded appropriately when the plaintiffs raised concerns about the fairness and accuracy of the publication.

[14] The defendants say Mr. Miller's expert report is inadmissible for a number of reasons. They say the expert opinion is unnecessary. They say Mr. Miller opines on areas both outside of his expertise and within the exclusive purview of the trial judge: the ultimate issue and issues of credibility. They submit it was improper to give Mr. Miller the examination for discovery transcripts. They submit the report lapses into advocacy for the plaintiffs, demonstrated in part by portions of the opinion which constitute legal argument rather than evidence. And lastly, they submit the report is based on speculation and/or misstated or incomplete facts and therefore is irrelevant.

[15] The parties do not dispute that the legal test to determine admissibility of expert opinion is set out in *R. v. Mohan,* [1994] 2 S.C.R. 9, which stipulated four mandatory criteria that must be met to admit otherwise inadmissible opinion evidence at trial:

(a) the evidence must be legally relevant;

(b) the evidence must be necessary in assisting the trier of fact;

(c) there must be no exclusionary rule otherwise prohibiting the admission of the evidence; and

(d) the evidence must be the opinion of a qualified expert.

[16] It bears repeating that “legally relevant” has a very specific meaning. In *Sopinka on Evidence*, the authors state that “[o]pinion evidence must have some probative value to make the existence or non-existence of a material fact more probable or less probable than it would be without the evidence.” If the expert evidence cannot assist the trier of fact to determine if a disputed material fact is more probable or not, it is unnecessary.

[17] The principal was stated slightly differently in *R. v. Beland*, [1987] 2 S.C.R. 398 at para. 74 where the Court stated:

> The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inferences which may be drawn from, proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact.

[18] Thus two important elements emerge. The expert must have specialized knowledge or expertise beyond that of the trier of fact. And, the opinion proffered by the expert must assist the trier of fact in making findings about material facts by providing his or her opinion on the probability about the existence of that material fact, or the ability to draw inferences from proven facts.

[19] In *R. v. J.-L.J.,* 2000 SCC 5 at paras. 30 and 56, the Court goes a bit further in commenting on the manner in which an expert's opinion should be of assistance: it is not enough that the opinion evidence is merely helpful, or that it might reasonably assist the trier of fact; instead, the opinion evidence must be required to enable the fact-finder to appreciate a matter of issue due to its technical nature. Further, trial judges have residual authority to exclude relevant expert evidence when the probative value of that evidence is outweighed by its prejudicial effect. The closer the opinion evidence goes to an ultimate issue in a given matter, the more strictly the criteria of necessity and the cost-benefit analysis ought to be applied.

[20] What does prejudice mean in this context? Typically, prejudice from the admission of evidence means a negative impact on the strength of a party's case.

An example is an application to admit late evidence. The party opposing its admission can argue, for instance, that the late evidence is prejudicial because she planned her trial strategy on the basis of the evidence she believed she had to meet. The court looks to the impact of its admission and what that impact is on the fairness of the trial to the parties even though there is no dispute evidence is relevant.

[21] In my view, that is not the way in which the Supreme Court of Canada used prejudice in *J.-L.J.* Instead, the Court was referring to the tendency of expert evidence to distort the fact-finding process. That case was about the admissibility of a psychiatrist's opinion on the existence in the accused of indicia of deviant sexual interest. The accused was charged with sexual offences against children. The trial judge excluded the expert evidence, the Court of Appeal reversed, and the Supreme Court of Canada reinstated the conviction, upholding the trial judge's exclusion of that expert opinion.

[22] Speaking for the Court, Justice Binnie starts by emphasizing that *Mohan* was an important decision in clarifying the test for admissibility of expert evidence. The Court noted that *Mohan's* emphasis on gatekeeping was important because of the increasing frequency of experts being called in criminal cases. In the ensuing debate about the suitability of expert evidence, the Court noted there must be measures to avoid “junk” science. The concern was that opinions would be dressed up in scientific language and may not easily be understood by the jury, possibly distorting the significance, weight or even relevance of the evidence simply because it was issued by an eminent and recognized person in the field.

[23] The plaintiffs argue before me that because this is a judge alone trial, there is not the same need for heightened concern about prejudicial effect. While I agree extra care must be taken when the trier of fact is a jury, that does not mean a consideration of prejudice is irrelevant in a judge alone trial. Thus, some consideration must be given to how probative the opinion is to material facts in this case, versus the potential that the fact finding process will be unduly influenced by that expert opinion.

[24] In *Mohan* the Court affirmed, in the second of the four factors, that whether the opinion is necessary to assist the trier of fact requires something more than that the opinion is merely helpful. Quoting from Justice Dickson's decision in *Abbey*, the opinion must be necessary in the sense that it provides information which is likely to be outside the expertise and knowledge of a judge or jury. The utility of an expert's opinion is, "... to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate." If on the proven facts a judge and jury can form their own conclusion without help then the opinion of the expert is unnecessary.

[25] In *Keefer Laundry v. Pellerin Milnor Corporation*, 2008 BCSC 119, Justice Smith noted that applying the criteria to determine if the opinion can assist the Court must be done by treating the report as a whole. Nevertheless, it is generally accepted that if only portions of a report are inadmissible and the report can still be helpful as a whole without the offending portions, the trial judge has discretion to redact those portions in order to make the report admissible. Obviously, this depends on the report itself, and the extent to which any inadmissible portions can be disentangled from the admissible portions.

[26] Applying these principles to Mr. Miller's report, I have concluded that his report is inadmissible for a number of reasons.

[27] The primary reason is that it is unnecessary. The crux of Mr. Miller's opinion is that an analysis of whether the CBC defendants met the standards expected of a reasonable, responsible journalist. Had this been a case of negligence, it is clear that the court accepts, and sometimes requires, expert opinion about the applicable standard of care. But this is a defamation case; the issue upon which Mr. Miller's report is proffered is to assist in what constitutes responsible communication. I have already reproduced above that test as articulated by the Supreme Court of Canada, and I will not repeat it here. It is important to note, however, that the test is not a complete code because the Court stated the list of factors is not exhaustive. However, the Supreme Court of Canada was careful to categorize it as a new

defence and not simply a clarification or subset of the existing defence of qualified privilege. In my view, the Court's reasons for doing that are relevant to my analysis.

[28] The Supreme Court of Canada stated that it took a principled approach in changing the law because of the incompatibility of the former defences with freedom of expression. In reviewing the defences available to media outlets in defamation (at paras. 30-37), the Court noted it remained unclear when, if ever, a media outlet can avail itself of the defence of qualified privilege. Thus, if a publisher cannot prove truth in a court of law, it was unclear if a viable defence existed for the media outlet.

[29] At paras. 41-57, the Court discusses the purposes for the protection of freedom of expression, including the fact that the courts recognized its importance and prior to the *Charter* being implemented, and its fundamental importance to a democratic society. The Court framed the issue as whether the traditional defences for defamatory statements of fact struck the appropriate balance between the competing values of freedom of expression on the one hand, and protection of reputation and privacy on the other. Clearly, the Court concluded that they did not. That is why it created the defence of responsible communication. The goal was to better achieve an appropriate balance amongst those values.

[30] The impetus to change the law was largely for the benefit of media outlets. While the defence is not limited to journalists, there is no doubt the Court was moved to create the category because of the primacy it placed on freedom of expression, and explicitly freedom of the press, as a fundamental tenet of our society. The defence was established with that in mind, and also with the view to balance the interests of privacy, reputation, against freedom of expression. In other words, the Supreme Court of Canada was alive to the competing interests involved.

[31] The Supreme Court of Canada created a set of questions to be asked, so a court can determine whether in a particular case, someone has met the standard of responsible communication. The Court could have created a test that would have required, or greatly benefitted from, expert evidence about what the standard should

be, but it chose not to. Instead, it listed relevant factors and set out a specific test. Essentially, it has articulated within the test itself the appropriate standard.

[32] Whether conduct meets that test is a fact-specific inquiry, but in my view none of the material facts will require specialized or technical knowledge that is outside the scope of a jury or a trial judge. The first step (whether it is a matter of public interest) has been specifically stated to be largely a question of law. The Supreme Court of Canada then lists seven factors to assist in deciding if a publisher was diligent, and in my view none of those involve considerations that are technical, complex or of a scientific nature.

[33] I acknowledge that the plaintiffs have directed me to cases where courts have admitted expert evidence similar to Mr. Miller's in defamation cases. Of course, individual decisions made in other contexts are not binding on me. More importantly, however, my understanding is that in none of those cases were objections taken to the admissibility of the reports. It appears the parties may have consented to admissibility. Therefore, those judges were not required, and did not engage, in the analysis that has been put before me. I add my observation that no evidence should ever be admitted by consent of the parties. Parties can agree evidence is admissible, but it always remains the exclusive purview of the trial judge who decides whether evidence is admissible or not. That applies to all evidence, including expert evidence.

[34] The test for admissibility states the purpose of expert opinion is to provide ready-made inferences that will help a judge determine whether material facts have been proven. Some of the questions I will have to assess in this case are the seriousness of the allegation, the urgency of the publication, and whether the plaintiffs' side of the story was sought and accurately reported. Mr. Miller's opinion on whether the CBC met certain industry standards, in my view, will not assist me to conclude one way or another whether those facts relating to seriousness, urgency, or accuracy of the plaintiffs' side were more or less met in this case.

[35] Furthermore, in some places Mr. Miller strays too far into expressing an opinion on the very questions before me, thus violating the rule against opining on the ultimate issue. That is another reason why portions of his report are inadmissible.

[36] I add that the ease with which his opinion strays into that territory is itself some indication of why expert opinion is not necessary. There is nothing involved in his analysis that cannot be gleaned from looking at the evidence itself; no special expertise or skill is required. That is sufficient, in my view, to exclude those portions of the report I have identified, but I comment on a few other issues.

[37] The defendants submit it is inappropriate to give an expert the entire examination for discovery transcript because it is not known what portions of that may or may not eventually be read into the record. This leaves the expert in the position of having to draw his or her own conclusions as to which facts should be used in support of the opinion. That violates a cardinal rule about expert evidence that the facts and assumptions upon which the opinion is based must be stated clearly.

[38] The plaintiffs submit that there is no absolute rule against providing the examination for discovery transcripts to experts, citing *Friebel v. Omelchenko,* 2013 BCSC 948. In that case, a party objected to an expert report because the expert was provided with the examination for discovery transcripts, although I note that involved transcripts from both parties, unlike in the case before me. Nevertheless, in analyzing the issues, Justice Ker points to the judicial commentary about the inappropriateness of simply handing over examination for discovery transcripts to experts, referencing some of the cases the defendants cited to me. But she clarifies that, in most of those cases, the Court specifically identified the problem was that the expert failed to outline or provide a statement of assumed facts. In the case before her, the expert did provide that outline. The report listed not only assumed facts given by counsel, but also further facts assumed in preparing the expert's report and their source. She stated at para. 13:

> A review of [the expert]'s report did not leave the reader in doubt as to what factual assumptions underlie the opinions provided in the report.

[39] As I explain below, I find Mr. Miller's report suffers from that exact problem, and therefore raises the possibility that he has failed to list all of the facts and assumptions upon which his opinion is based.

[40] I analyze that possibility, together with the defendants' objections about usurping the role of the trier of fact. The defendants say Mr. Miller improperly opines on credibility and the ultimate issue. I agree.

[41] Mr. Miller was given a letter of instruction in which counsel set out 27 paragraphs of factual assumptions. Mr. Miller said he relies on those and the letter is properly attached to his opinion. However, he then says, "I also refer to Mr. Rankin's account of his interview with the defendants as detailed in his examination for discovery."

[42] In legal discourse, there is an important difference between relying on something (using it as a reason why you make a finding), and referring to it (the matter becomes part of the context and background). It is not clear to me if Mr. Miller intended to invoke that difference.

[43] More importantly, Mr. Rankin's accounts of the interview are not set out in any fashion in Mr. Miller's report. I am left to assume that they are to be gleaned from reading the entire examination for discovery transcript. While it is true there are pinpoint references in the body of his report and one quote, it is also clear that he relies on portions not cited. For example, in one portion of the report he states an "example" to be typical of others, and the other examples are not identified, and therefore I do not know what they are.

[44] In my view this is the exact danger identified in the case law from giving the examination for discovery transcript to experts.

[45] One of the primary tasks of a trial judge when weighing the usefulness and ultimately the persuasiveness of any expert report is to ask how well the assumed

facts upon which the expert based his or her opinion matched the evidence proven at trial. Having assumed facts set out clearly allows the judge to easily conduct that assessment. Most of Mr. Miller's answer to question 3 suffers from the inability to discern the facts that he bases his conclusions and opinions on. That is most acute when he concludes that Mr. Rankin did not do enough to report the plaintiffs' version of the facts.

[46] As a starting point, Mr. Miller refers to one of the assumed facts at para. 19 in the letter of instruction. It states, “Mr. Rankin learned that Ms. Burnham's major complaint with the third estimate was the increased price for the sauna.” That the increased price for the sauna was Ms. Burnham's complaint may or may not equate to it being a “key problem” in the dispute she had with Level One. In his report, Mr. Miller goes beyond that fact. At page 5 he states, “Mr. Rankin correctly determined that the key difference in the two estimates was cost of sauna.”

[47] It is not clear the basis for Mr. Miller concluding that the sauna was the “key difference”. If he is basing that only on paragraph 19, that is not what paragraph 19 says. I acknowledge that it may be a reasonable, fair and ultimately accurate inference to draw from paragraph 19. And that it ultimately might be proven true at trial that a key difference between the two estimates was the cost of the sauna. However, Mr. Miller goes even further. On page 7 he focuses on answers that Mr. Rankin gave at the examination for discovery about what particular notations in his handwritten notes from his interview with Mr. Kautzman meant. Mr. Rankin's responses included "I am not sure what that means", "I honestly don’t remember", and "I don’t recall exactly".

[48] Mr. Miller remarked that at the discovery Mr. Rankin did admit that he read a November 19 email that Mr. Kautzman sent to Ms. Burnham. Mr. Miller characterizes that email to be one where the president “clearly explained” what an allowance is and what its relevance was to the dispute. The email was not included in his report, nor was it an assumed fact given to him. He then goes on and references Mr. Rankin saying, "[t]here had been some bone of contention over the

sauna, that's what I remember," as an answer, but I do not know what question was specifically asked.

[49] Having identified these items from the transcript, Mr. Rankin admitting to having read the email, Mr. Miller states a conclusion that it "is a rather surprising admission from someone who claims to have investigated the story thoroughly and clearly understood that the cost of the sauna was a key factor." Mr. Miller has drawn a conclusion about Mr. Rankin's state of mind when he says "clearly understood," and it is not clear to me the facts upon which he bases that conclusion.

[50] There are two aspects of this which are problematic: First, he is stating that the cost of the sauna was the key factor (as discussed above). Second, he is assuming that Mr. Rankin was of the same view, apparently based on assumed facts, isolated answers to examination for discovery transcripts and the apparent content of an email. However, Mr. Miller has no expertise relative to the court on drawing conclusions or inferences from the same material. Had that been all that had happened, it might have been a minor concern, but he then uses the conclusions he has drawn to question the credibility of a witness. Mr. Miller wrote, "[e]ven if we give Mr. Rankin the benefit of doubt and accept he cannot remember key details of his interview with Mr. Kautzman and cannot explain his own notes …". Credibility findings are the exclusive domain of triers of fact, and it is inappropriate for an expert to comment on that.

[51] The plaintiffs have suggested that if I found it unclear what use Mr. Miller made of the transcript citations in his report, I could excise those and subject them to little or no weight. I do not agree. The citations are too interwoven with Mr. Miller's characterization of the evidence amongst various sources that it would be difficult, if not impossible, to properly exercise portions and leave a coherent opinion.

[52] For all these reasons, the report is inadmissible because the whole examination for discovery transcript was given to Mr. Miller.

[53] The defendants also contend that Mr. Miller's opinion amounted to advocacy and displayed bias, which is clearly impermissible. However, in my view, Mr. Miller does not cross that line, but has only been firm and emphatic in advocating his opinion: *Keefer Laundry*.

[54] For all those reasons, Mr. Miller's expert report is inadmissible.

“Sharma J.”