

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: *Anderson v. Pieters*,  
2016 BCSC 1244

Date: 20160427  
Docket: M160840  
Registry: New Westminster

Between:

**Teresa Anderson**

Plaintiff

And

**Glen Pieters, Gold Key Sales and Lease Ltd.,  
and Acrotech Cleaning Systems Inc.**

Defendants

Before: The Honourable Mr. Justice A. Saunders

**Oral Ruling No. 2 on *Voir Dire* #2  
re Admissibility of Report of Dr. D. Sass**

Counsel for the Plaintiff: G. A. Smith

Counsel for the Defendants: T. Pettit

Place and Date of Trial/Hearing: New Westminster, B.C.  
April 26-27, 2016

Place and Date of Judgment: New Westminster, B.C.  
April 27, 2016

[1] **THE COURT:** Late yesterday, I made my ruling on the admissibility of the reports of the plaintiff's optometrist Dr. Sass. I ruled that the reports were inadmissible as being beyond the scope of Dr. Sass' expertise. My ruling in part was based an interpretation of the *Optometrists Regulation*, B.C. Regulation 33/2009, to the *Health Professions Act*, R.S.B.C. 1996, c. 183, in particular s. 5 on the restrictions on practice, which provides that an optometrist may make a diagnosis:

(a) make a diagnosis identifying, as the cause of signs or symptoms of an individual,

...

(iii) a disease or disorder of an eye or an anatomical structure directly related to the vision system;

[2] Having had some further opportunity to reflect on that yesterday evening, I questioned whether the interpretation that I gave of that section was correct. The position taken by the plaintiff was that the brain was an anatomical structure directly related to the vision system, and my response to that was that the brain is only indirectly related by being linked to the eye through the optic nerve. I questioned, on reflection, whether that was a correct interpretation, and I therefore questioned whether my ruling on the admissibility of Dr. Sass' reports ought to be revisited.

[3] Mr. Pettit – it was your objection, I heard from Mr. Smith in reply, and I did not give you an opportunity to respond to what Mr. Smith had said, so I would like to give you that opportunity now to, if you have anything to say regarding the position taken by the plaintiff on the question of whether the opinion expressed is outside the scope of Dr. Sass' expertise.

[SUBMISSIONS]

(PROCEEDINGS ADJOURNED AND RECONVENED)

[SUBMISSIONS]

[4] THE COURT: I began this morning by indicating that I might be prepared to revisit the decision that I made yesterday on the admissibility of Dr. Sass' report. I invited further submissions from counsel which have been most helpful.

[5] Counsel for the plaintiff, whose report is at issue, takes the position that the brain is an anatomical structure in respect of which an optometrist is entitled to make diagnoses. My response to that, as I recall, in giving my ruling yesterday was that the brain is not directly connected to the visual system, it is only indirectly connected by way of the optic nerve.

[6] Having had an opportunity to give that further thought over yesterday evening, and having heard the submissions of counsel yesterday, I do revisit that aspect of my ruling. In my view, on reflection, there is, in the Regulation, clearly a distinction made between the eye and anatomical structures that are directly related to the vision system. It is, of course, the case that the brain is indirectly connected to the eye by means of the optic nerve, but that does not answer the question of whether the brain, or the area of the brain Dr. Sass postulates as having been injured, is an anatomical structure "directly related to the vision system".

[7] In my view, the interpretation of the words "vision system" must be broader simply than the mechanical features of the eye or the optic nerve, and would also entail all of the anatomic and neurological structures that enable the sense of sight, not only the peripheral nervous system, but also the central nervous system, including those parts of the brain that process visual signals.

[8] So at least, as s. 5 says, "in the course of practising optometry" it is, in my view, appropriate for an optometrist to make a diagnosis of a dysfunction of the visual system as a whole, including those parts of the brain that process signals emanating from the eye and being transmitted through the optic nerve.

[9] Having said that, the reports of the defence doctors, Dr. Sexton and Dr. Dost, do raise serious concerns about allowing evidence of that kind of diagnosis to be adduced as evidence in the court on what, in the words of *R. v. Mohan*, [1994] 2 S.C.R. 9, approaches an ultimate issue; that being the question in this case of whether there is, in fact, a brain injury, it being the case, as I said in my ruling yesterday, that there are no other medical practitioners or health practitioners in this case who have diagnosed the plaintiff as suffering with a brain injury.

[10] Dr. Sexton, the defence expert, has some remarks in her reports about the scope of optometric practice. Dr. Sexton herself is a general ophthalmologist and a neuro-ophthalmologist; not an optometrist, but an ophthalmologist. She is a medical doctor with a sub-specialty. To quote from sections of Dr. Sexton's report of – I do not see a date here, Mr. Pettit, under Tab B of the affidavit.

[11] MR. PETTIT: My apologies, I think you're right, I don't think there is a date on it.

[12] THE COURT: Well, it says in the affidavit that it is a report dated March 8, 2016, so I will refer to it as such. It is Exhibit B to the affidavit of Pardis Sedaghat, legal assistant, marked as Exhibit 1 to this *Voir Dire* #2. At page 1, Dr. Sexton is asked:

Is there a recognized field of development optometry? Is such a field recognized by mainstream medicine?

She replies:

Optometrists recognize this field. It is not recognized by mainstream medicine. A group of optometrists have created a certifying body called the College of Optometrists in Vision Development (COVD). They issue certification based on completion of open book questions, submission of case reports a multiple choice exam and an oral interview. Candidates have 4 years to complete the process. The exam can be re-taken indefinitely. Dr. Sass' website states that he is a member of the COVD. It does not state that he is a fellow of the COVD. If this is accurate then Dr. Sass has paid money to join a group of optometrists who have self-selected to

provide care in the area of "developmental and behavioural vision care and vision therapy" but has not undergone extra training in this area.

[13] I interject to say that may be the case with respect to training, but I did allude in my previous ruling to the experience that Dr. Sass has working in the field of neuro-optometry by way of taking courses and lecturing. However, Dr. Sexton goes on further at page 2 of her opinion to say:

Neuro-optometry is not recognized by mainstream medicine. It is most definitely not a "sub-specialty of medicine". Optometrists do not hold a Doctorate of Medicine. Being a member of the "Neuro-optometric rehabilitation program" (NORA) means that one has paid dues, there are no educational or clinical criteria.

[14] She then goes on to make reference to diagnoses that have been made by Dr. Sass. She says:

Oculomotor dysfunction and visual perceptual dysfunction are not medical diagnoses. They do not have corresponding ICD-9 codes. These terms are not used by ophthalmologists, neuro-ophthalmologist[s], neurologists or neurosurgeons.

[15] Dr. Dost, the defence expert in neurology, also expresses concerns with regard to it being within the scope of practice for an optometrist to make a diagnosis of a brain injury. He prefaces his report of February 17, 2016, Exhibit C to the affidavit of Ms. Sedaghat, with the following statement:

I preface my comments by stating that scope of practice is an issue for the Courts to decide. From a medical point of view, optometrists do not undergo neurological training, do not evaluate patients in the acute setting (ER, on-field or referred by the ER or GP), do not receive referrals from medical professionals to diagnose mTBI/PCS/ concussion, and are not qualified to conduct a full neurological examination, including cognitive examination. Thus, from the medical point of view, it would not be appropriate for optometrists to diagnose mTBI/concussion/PCS.

[16] I acknowledge the submission made today by the plaintiff's counsel that Dr. Sass is not purporting to provide an opinion as to neurological functioning of areas of the brain other than those which are part of the vision system, and I think that is the case. However, the evidence of these doctors raises to my mind very serious concerns of the nature we discussed yesterday in my ruling on the admissibility of the chiropractor Dr. Blaskovich's reports, in terms of the novelty of the science and whether the diagnoses that are being advanced by Dr. Sass, which support his conclusion of there being a brain injury, are sufficiently within the mainstream that they ought to be accepted under the *Mohan* criteria.

[17] I do note, as well, the decision of Madam Justice Russell in *Warren v. Morgan*, 2013 BCSC 708, in which she made a ruling on a report of a Dr. Kevin Loopeker, at para. 283:

Dr. Loopeker is an optometrist. The admissibility of his evidence was challenged by the defence with respect to his opinions in his report diagnosing brain injury and "post-traumatic vision syndrome". He was qualified as an expert in the treatment of visual disturbances. I did not accept that he has the training to [diagnose] a closed head brain injury or a condition of that nature. His evidence was limited in this regard.

[18] Given the concerns expressed by Dr. Sexton and by Dr. Dost in their reports as to the acceptability of the diagnoses tendered by Dr. Sass, and in particular his diagnosis or inference of the plaintiff having suffered a brain injury, I am of the view that Dr. Sass' opinions in that regard should not be accepted. I am confirming the ruling that I made yesterday.

[19] It seems to me that a diagnosis of the visual system, including neurological issues related to the processing of visual information as part of the visual system within the brain, may be part of the professional scope of what is permitted within the practice of optometry. So, insofar as such a diagnosis may be required to lead to any of the forms of treatment set out in s. 5 as being within the restricted activities, it is appropriate for an optometrist -- appropriate in the sense of being within the scope of practice -- to make a diagnosis or at least a provisional diagnosis of a brain injury in order for them to prescribe specific care. That is not to say, however, that their opinions as to whether there is a brain injury ought to be accepted at large, for all purposes, and it does not mean, with respect to a civil trial where the optometrist's evidence touches upon an ultimate issue for decision by a jury, that their opinion is necessarily admissible for that purpose. In view of the novelty of the science, in a case where the existence of a brain injury is disputed, and is not supported by medical evidence, opinion evidence of an optometrist or neuro-optometrist ought to be limited to addressing the types of treatment of visual disturbances that are judged to be appropriate.

[20] For those reasons, my ruling stands.

[21] That brings us to the question of what we do with Dr. Sass' reports, in terms of whether they may be salvaged through redaction of offending passages, which is the task I set counsel upon yesterday evening.

[SUBMISSIONS]

(PROCEEDINGS ADJOURNED AND RECONVENED)

[SUBMISSIONS]

[22] THE COURT: This report in the form that it has been presented is simply inadmissible. Explicitly and implicitly it references a brain injury. There is no injury posited

other than brain injury. The finding of brain injury is implicit in the report's extensive comments as to matters in the nature of cognitive skills, and visual processing skills. We see Dr. Sass interviewing the plaintiff about things like word finding in conversation, being prone to stress and having difficulty sleeping, and crowded and noisy environments being disturbing. These are all factors that go to cognition, a matter of brain function and, implicitly, brain injury. There is no injury postulated by Dr. Sass, other than brain injury, which could serve as any causative link between the collision that is at issue in this case and the injuries that are alleged.

[23] So, the report in this form is not going in. The plaintiff's counsel says the report can still be salvaged on the basis that Dr. Sass may be of the opinion that the plaintiff's visual injuries can all be explained on the basis of, not a brain injury, but a neck injury. Again, I welcome counsel to make that attempt, but I note the continuing delay, and I am very concerned about the jury.

[SUBMISSIONS]

(PROCEEDINGS ADJOURNED AND RECONVENED)

[SUBMISSIONS]

[24] THE COURT: Following my ruling of this morning as to the admissibility of Dr. Sass's opinions, what we have dealt with is the question of whether there is anything in Dr. Sass' expert reports capable of being admitted, once the explicit and implicit references to brain injury are excluded.

[25] The plaintiff contends that the reports of Dr. Sass, in addition to positing brain injury as a cause of the visual disturbances identified by him, also posit an alternative mechanism, being a neck injury or, as it is also referred to in the reports, a whiplash-type injury. It is not controversial that the plaintiff did suffer, as least as I understand it – and I stand to be corrected by counsel if I am misstating the position of the parties – but it is, as I understand it, not controversial that the plaintiff did suffer a whiplash-type neck injury to her musculoskeletal system in the subject accident.

[26] What is proposed, therefore, by the plaintiff is that an expert opinion report of Dr. Sass can be properly put before the jury in a sanitized form which deletes any reference, either explicitly or implicitly, to brain injury, and refers solely to neck injury as being a cause of the visual disturbances that have been diagnosed.

[27] The defence takes exception to that and contends that such an opinion from Dr. Sass would effectively be a new opinion. The defence says that although mention is made by Dr. Sass in his reports of neck injury, it is always in the context of a neck injury having caused a brain injury, and the brain injury then being stated, either implicitly or explicitly, to have been the cause of the visual issues. The defence submits there has been no suggestion by Dr. Sass, explicitly or implicitly, of musculoskeletal injury alone being an independent cause of the plaintiff's visual issues. When I say alone, I mean independent of any injury or trauma to the brain.

[28] The defence says that they would be prejudiced at this late stage in having to respond to such a substantively new opinion from Dr. Sass, in that their whole defence strategy, in terms of responding to his opinions, has been based on the premise that what is being dealt with here is a brain injury issue. The defence did respond to Dr. Sass' opinion with a rebuttal report from a neurologist.

[29] These positions require that I parse Dr. Sass' opinions to determine what exactly he has opined is the cause of the plaintiff's alleged visual disturbances.

[30] What Dr. Sass said in his first report of August 30, 2015, under the heading "Opinion", is as follows:

Teresa Anderson displays a number of visual problems that are consistent with acquired brain injury and are unlikely to be longstanding. These visual problems can be sustained as a result of neck injury as diagnosed by Dr. Otterstrom in November 2012 and described in the physiotherapist clinical notes and Dr. Craig's report, with or without associated concussion. In my opinion the visual problems are the result of injuries sustained in the motor vehicle accident in question.

The plaintiff points to this passage from Dr. Sass's opinion as being such an opinion of an independent, purely musculoskeletal cause of the vision problems.

[31] There has been an alternative report of Dr. Sass, again another sanitized or redacted form of Dr. Sass's opinion, put before the court, dated April 27, in which it is proposed that the opinion be stated as follows [as read in]:

My opinion remains the same as stated in my August 15, 2015, report. Teresa Anderson has persistent vision problems that interfere with her activities of daily living. As her vision symptoms were reported soon after the motor vehicle accident in question, injury sustained in the accident seems the most likely cause of her vision problems ...

– and with no specific mechanism of injury being posited in that redacted, sanitized version of Dr. Sass's report. That alternative report is stated to be supplemental to his report of April 26, again another sanitized report, in which Dr. Sass says under the heading, "Opinion":

Teresa Anderson displays a number of visual problems that are unlikely to be longstanding. In my opinion the visual problems are the result of injury sustained in the motor vehicle accident in question.

[32] On the issue of whether that is a new opinion, it is necessary to put the opinion as originally expressed in the August 30, 2015, report in context by making reference to the next section of the report that follows, a section a little less than three pages long under the heading "Discussion". What Dr. Sass says here in the second paragraph is this:

It is important to realize that over 65% of the neural connections made in the brain involve vision. Five of the ten cranial nerves relate to visual function. The brain is not fixed within the skull, it is bathed in protective tissues and fluid. When an impact force to the head is received, the brain can be damaged at the site of contact and the force transferred can cause the brain to shift and twist against the inner walls of the skull. This type of injury can damage the brain anywhere and can cause many different neurological deficits.

[33] I pause to note that what Dr. Sass is stating here is a mechanism by which injury to the brain can result from an impact force to the head.

[34] He then goes on in the same paragraph to say:

Whiplash type injuries to the neck can have similar results. The shearing forces in this type of injury can break blood vessels, harming the areas supplied, as well as damaging the nerves and connections directly. Hearing deficits, speech impairments, and dizziness are seen commonly ... .

[35] The point is that in the very substantive discussion section of Dr. Sass's report, in which he elaborates on the reasons for the opinion he has stated, the only mention made of a neck injury or a whiplash injury being a causative factor in terms of the visual disturbances he has diagnosed is in the context of it producing a brain injury.

[36] Similarly, in Dr. Sass's report of March 12, 2016, Dr. Sass refers to Dr. Blaskovich's diagnosis of damage to the ligaments at the C1-2 level. That is an opinion we have already excluded although, as the plaintiff I think correctly points out, there are doctors other than Blaskovich who have made a diagnosis as to a neck injury. What Dr. Sass goes on to say, however, with respect to Dr. Blaskovich's opinion, and the role of the neck injury in the visual disturbances, is as follows:

While his study and conclusions are beyond the area of my expertise, I do feel that his diagnosis of Teresa's neck injuries lends strong evidence to whiplash injury being the most likely cause of her vision problems, as well as many of her other complaints. He reports that this type of ligament injury results in cervical instability at the brain stem region and can cause headaches, neck pain, dizziness, nausea, balance problems, vision and auditory disturbances, head and ear pressure, sleeplessness, tiredness and fatigue, nervousness, irritability, and concentration problems.



[37] That, of course, is opinion that has been excluded. Then he goes on to say:

Teresa suffers from most, if not all of these symptoms. The twisting of the head in this sort of injury causes angular acceleration of the brain structures and I believe this is thought to be a more pervasive injury than those due to linear acceleration. I will enclose a copy of a case report from Bengt Johansson MD in which he describes the symptoms of Cervicocephalic syndrome after whiplash injury including; headaches, balance, tinnitus, and vision problems.

[38] So again, in that report, it is clear that Dr. Sass is basing his opinion of there being a link between the neck injury and the visual problems, in terms of the neck injury causing an injury to the brain.

[39] Comments to the same effect are found of the report of Dr. Sass dated March 13, 2016, in which he says at p. 3:

It may be helpful to note that I consider concussion to be a milder presentation of mild traumatic brain injury. Whiplash injuries result in various levels of brain injury if the pulling forces on the brain extend beyond soft tissue and skeletal injuries. While photophobia and visual processing disturbances have been associated with sleep deprivation, mood disorders, and some medications, the constellation with focusing and eye movement discomfort is more typical of acquired brain injury, particularly with diagnosed cervical injuries. Given Teresa's report of increased visual symptoms post-accident, it seems likely that the accident involved some level of mild acquired brain injury.

[40] So in summary, I find that Dr. Sass's opinions have throughout always been based on a finding, a diagnosis, or a presumption of brain injury. There is no cause of the visual problems he has identified, other than brain injury, articulated in his reports. Explicitly and implicitly the thrust of his reports is all in the other direction, aiming towards a brain injury. Any report from Dr. Sass positing a new cause of the visual disturbances other than brain injury would be, in effect, a new opinion, and its admission at this late date would be prejudicial.

[41] As a result, I am ruling that Dr. Sass's reports are excluded in their entirety and he will not be giving opinion evidence in this trial.

"A. Saunders J."