

Case Name:

Laudon v. Roberts

Between

**Rick Laudon, Plaintiff, and
Will Roberts and Keith Sullivan, Defendants**

[2007] O.J. No. 1702

42 C.P.C. (6th) 315

2007 CarswellOnt 2729

Barrie Court File No. 02-B5188

Ontario Superior Court of Justice

G.P. DiTomaso J.

Heard: April 20 and 23, 2007.

Judgment: April 26, 2007.

(43 paras.)

Civil evidence -- Opinion evidence -- Expert evidence -- Qualification as an expert -- Criteria for admissibility -- Motion by the plaintiff to admit expert evidence allowed -- The plaintiff sought to qualify the witness as an expert physician and psychotherapist with special expertise in chronic pain treatment -- The court found that the witness's expertise was defined with precision, and established in the specified areas -- The evidence was necessary, as it was outside of the experience and knowledge of the trier of fact, and would enable an appreciation of technical matters in issue -- The proffered evidence was not barred by any other exclusionary rule.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 53.03(3)(b)

Counsel:

J. Ralston and B. Keating, for the plaintiff.

E. Chatterton (not present), for the defendant, Roberts.

M. Forget and L. Matthews for the defendant, Sullivan.

RULING
RE ADMISSIBILITY OF EVIDENCE OF
DR. DAVID A. MURPHY

1 G.P. DiTOMASO J.:-- The plaintiff seeks to qualify Dr. David A. Murphy as an expert physician/psychotherapist with special expertise in chronic pain treatment, chronic pain medications, post-traumatic stress disorder and addiction/dependence psychotherapy and as such, he is entitled to give his expert opinion within his field of expertise.

2 The defendant Sullivan objects on the basis that Dr. Murphy is not a properly qualified expert. In addition, his proffered evidence neither meets the necessity test nor the absence of any exclusionary rule test as set out in *R. v. Mohan*.¹ There is an additional issue in respect of Dr. Murphy's last report dated February 27, 2007. It is asserted by the defence that this is not a supplementary report pursuant to rule 53.03(3)(b) of the *Rules of Civil Procedure*. Said report had not been served within 90 days and accordingly, leave should not be granted to extend or abridge the time of service.

3 The plaintiff submits that Dr. Murphy is a properly qualified expert, his evidence is necessary and there is an absence of any exclusionary rule that would prohibit the admissibility of his evidence. Further, Dr. Murphy's report dated February 27, 2007 is a supplemental report raising no new issues and is properly served in accordance with rule 53.03(3)(b).

4 These issues were dealt with by way of *voir dire* held April 20 and April 23, 2007. In this regard, I have read Dr. Murphy's reports dated December 13, 2004; July 29, 2005; and February 27, 2007 contained in the brief marked Exhibit "D" on this *voir dire*.

ANALYSIS

5 In *Mohan*, the Supreme Court stipulated that expert evidence will only be admitted when the following four criteria are all met:

- (a) relevance;
- (b) necessity and assisting the trier of fact;
- (c) the absence of any exclusionary rule; and
- (d) a properly qualified expert.

I. Is Dr. Murphy a Properly Qualified Expert?

6 Dr. Murphy's curriculum vitae was marked as Exhibit "A" on this *voir dire*. Dr. Murphy was taken through his curriculum vitae which set out various headings including the following:

- Degrees and Diplomas
- Clinical Experience
- Medical Registrations

Memberships

Publications

Invited Lectures and

Board and Committee Appointments.

7 He received his Doctor of Medicine and Surgery from University of Manchester Medical School, Manchester, England in 1973. He completed various residencies including the equivalent of a first year residency in psychiatry as well as further studies in anesthesia, obstetrics/gynaecology and emergency medicine.

8 He completed his anesthesia training in Kingston, Ontario where he described the training received in the field of anesthesiology which included extensive training in the areas of management of chronic pain and training in pain medication management both operatively and post-operatively. He became a Fellow of Royal College of Physicians and Surgeons of Canada in anesthesia in 1981 which is a designation which he still holds today. He became a certified practitioner of Neurolinguistic Programming (N.L.P.) in 1994 and a Master Practitioner of Neurolinguistic Programming (N.L.P.) in 2003. This is a form of psychotherapy. He has also received Level I and Level II Certification: Eye Movement Desensitization and Reprocessing (EMDR) in 1999. He was approved as a psychotherapist for the R.C.M.P. in 2001. He has been a Certified General Practice Psychotherapist since 2002 and a N.L.P. trainer since 2003. He has been a Clinical Member of the Association for the Treatment of Sexual Abusers since 2006.

9 He reviewed his clinical practice in psychotherapy and pain management from 1993 to present. His active patient load is 51 which reflects an historic patient mix of 50% of his practice devoted to Post-Traumatic Stress Disorder, 18% to chronic pain and 32% relating to the treatment of sex offenders.

10 In addition to his training as an anesthesiologist, he has worked as a staff anesthesiologist at a number of hospitals where he was involved in the diagnosis and management of acute and chronic pain.

11 He has done some writing and lecturing although his focus has been as a clinical physician/psychotherapist.

12 In his practice he has dealt with issues of substance abuse and/or dependence issues in the area of 90%.

13 He has provided psychotherapy services in these various areas over the last 14 years and has expanded his knowledge and expertise in those areas.

14 In his cross-examination, he indicated that he did not have as much training as a psychiatrist. However, Dr. Murphy is not holding himself out as a psychiatrist. Sometimes he defers to the expertise of psychiatrists and sometimes they defer to him. Sometimes physicians and psychiatrists refer patients to him. Sometimes he refers patients to other physicians and psychiatrists. He started providing psychotherapy services for chronic pain patients some seven years ago as part of his practice. In his practice he treats the whole body and whole mind. Often at times in his practice there are shared cases where he as the psychotherapist works alongside the psychiatrist.

15 He was questioned about not having any special designation or qualification by the Royal College of Physicians and Surgeons of Canada. He testified that the College did not certify the scope of his practice.

16 He was challenged on not having sufficient training with which he disagreed. Both the N.L.P. and EMDR forms of treatment are psychotherapy tools which he has effectively used to deal with chronic pain. Since 1999 he has treated chronic pain patients from a psychotherapy point of view and has added a medication management component in 2001. He has attended conferences and training courses to increase his knowledge about psychotherapy. He has specialized in psychotherapy and has treated chronic pain patients without nerve blocks. About 18% of his practice involves chronic pain patients.

17 He was challenged in respect of having no specific training in respect of post-traumatic disorder. He disagreed. He has gained a body of knowledge in respect of this area through his medical training, educational courses, seminars, workshops and the experience again through his own practice.

18 He was challenged about the lack of publication or lectures. His focus, again, was primarily in respect of clinical practice which did not require publication of scientific articles. He disagreed that his training amounted to very little difference than the training received by a family physician. Once again, substance abuse and dependence issues were very high in his practice - around 90%.

19 Essentially, the thrust of his cross-examination was to establish that Dr. Murphy did not possess the experience, training and expertise in the area of treating chronic pain and addiction/substance abuse patients that would qualify him as an expert.

20 In *Mohan* at para.22 Justice Sopinka states that an expert's opinion is necessary if it is required to provide information which is likely to be outside the experience and knowledge of a judge or jury. The evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. Further, the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.

21 The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters in which he or she undertakes to testify.²

22 A party seeking to qualify an expert witness should define with precision the scope of his or her proposed expertise.³

23 I agree that the trial judge should take seriously the role of "gate-keeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.⁴ However, keeping this principle in mind, how the expert attained the expertise may go to weight and may not affect admissibility.⁵

24 A witness does not have to demonstrate expertise solely through advanced education or through the delivery of lectures and publications. Witnesses can obtain the necessary expertise through training and experience.⁶

25 Having considered the foregoing principles and having scrutinized the admissibility of the expert evidence being proffered, I find that Dr. David A. Murphy is qualified as an expert to give evidence as a physician/psychotherapist with special expertise in chronic pain treatment, chronic pain

medication, post-traumatic stress disorder and addiction/dependence psychotherapy. His area of expertise has been defined with precision by the plaintiff seeking to qualify him as an expert witness.

26 I find that his training and experience in a clinical practice over the last 14 years has provided him with expertise in areas of chronic pain treatment and chronic pain medication. In addition, a large and extensive part of his practice deals with an addiction and substance abuse component. Further, 50% of his active patient load deals with the treatment of post-traumatic stress disorder patients.

27 It has been demonstrated that his expertise is outside the experience and knowledge of a judge or jury. Other physicians and psychiatrists refer patients to him for psychotherapy treatment. He refers patients to other physicians and psychiatrists for treatment. He also works in tandem with psychiatrists to practice on a "shared case" basis. To carry on a clinical practice of this nature requires a special skill and expertise which Dr. Murphy possesses. For these reasons, I find that he is a properly qualified expert.

II. Is the Proposed Evidence Necessary?

28 In order to meet the necessity requirement, the expert evidence must be more than merely helpful. The evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. Further, the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted persons with special knowledge. Expert evidence provides evidence by way of the expert's opinion as to the inference that should be drawn from the primary facts. Experts are allowed to give their opinion because the trier of fact is not likely to have the requisite expertise and, therefore, not likely to draw the appropriate inference from the primary facts.⁷

29 The defence submits that much of what is contained in the three reports of Dr. Murphy namely the reports dated December 13, 2004, July 29, 2005 and February 27, 2007 is duplication which does not satisfy the necessity requirement as set out in *Mohan*. Defence counsel analyzed each report where various opinions stated by Dr. Murphy were also opinions rendered by Dr. Zajc. Dr. Zajc was qualified as an expert witness in family medicine and palliative care. She was qualified to give expert opinion evidence within her area of expertise. Her opinion evidence is the same as Dr. Murphy's which renders his evidence unnecessary. Defence counsel relied upon the decision of Justice Klowak in *Marsland v. Nochez*⁸ where it was held, pursuant to s.12 of the *Evidence Act*, three experts could not be called to give evidence on the same issue. Defence counsel submits that to permit Dr. Murphy to give his evidence in this case would offend the test for necessity and would also violate the rule against oath helping.

30 In respect of the overlap issue, in *Taylor v. Sawh*, the Ontario Court of Appeal reversed a trial judge's decision that because two engineers were going to provide accident reconstruction testimony, it was unnecessary for a qualified police officer to offer an opinion on the cause of the accident. At para. 18, Justice Rosenberg stated:

In the context of the admission of expert evidence, necessity refers to information that is likely to be outside the experience and knowledge of the jury. The opinion of a qualified expert does not become unnecessary simply because there may be other, even other more qualified experts who will be testifying at trial.

31 Necessity is to be judged according to whether the particular kind of evidence being offered meets the necessity requirement, not according to whether other experts have already filled the need for expert testimony.⁹

32 I find that Dr. Murphy's proposed evidence meets the necessity test as set out in *Mohan*. The fact that there are instances of overlap between his proffered evidence and the evidence of Dr. Zajc does not render his evidence unnecessary. Quite apart from the question of whether Dr. Murphy is a properly qualified expert as I have found, the question of whether his evidence is necessary requires a separate analysis. I have conducted that analysis and I find that his evidence within his area of expertise is necessary to provide information outside the experience and knowledge of the trier of fact. The evidence is necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. His evidence comes from the unique perspective of a physician/psychotherapist with 14 years experience dealing with chronic pain treatment, chronic pain medications, post-traumatic stress disorder and addiction/dependence psychotherapy. He possesses the skill, training and clinical expertise to speak to his area of expertise in this case relative to Mr. Laudon's medical condition.

33 In addition to my finding that the proffered evidence of Dr. Murphy is necessary, marked as Exhibit "E" on this *voir dire* is the ruling of Justice Stong dated March 27, 2006. The ruling related to leave to call more than three experts. Justice Stong ruled that the plaintiff was entitled to call ten expert witnesses including Dr. Murphy "who all enjoy separate areas of expertise and will be providing opinion evidence, particularly, which is from that unique and separate area of their expertise."

34 Although Justice Stong was not in a position to deal with any overlapping evidence or absence of uniqueness issues on the motion before him, he commented that whether the evidence is unique or from a different area of expertise and a different discipline would be a matter of fact.

35 I am of the view that Justice Stong in his ruling of March 27, 2006 permitted Dr. Murphy and other of the plaintiff's experts to give expert opinion evidence in this case.

36 Further, if it proves during the course of the trial that some of the expert testimony is unnecessary because there is a duplication of evidence not in dispute, I would be in a position to make rulings in that regard. Plaintiff's counsel relied on *Burgess (Litigation Guardian of) v. Wu*¹⁰ where Justice D.S. Ferguson was of the view that he could probably curtail such unnecessary duplication during the trial by inquiring of the defence if the content of any repetitive testimony was in dispute. I agree with this approach. Therefore, for the foregoing reasons given, I find that the proffered evidence of Dr. Murphy meets the necessity test as set out in *Mohan*.

III. Is the Proffered Evidence Barred by any Other Exclusionary Rule?

37 Counsel for the defence submits that the evidence of Dr. Murphy violates the rule against oath helping and only seeks to corroborate the evidence of Dr. Zajc. To some extent, this question relates to partial overlap between the evidence of Dr. Murphy and Dr. Zajc. Dr. Zajc is not qualified as an expert to give evidence in Dr. Murphy's area of expertise. She is qualified to give evidence in respect of the area of family and palliative medicine. Defence counsel submits that the proffered evidence of Dr. Murphy violates the rule against oath helping in that his reports are replete with opinions the same or similar to the opinions of Dr. Zajc. I find that Dr. Murphy prepared independent medical reports with a view to providing his own independent opinions. Evidence of a witness violates the rule against oath helping only when the material point it primarily addresses is the credibil-

ity or reliability of another witness, and where it affirms, directly or indirectly, that witness's belief in what the other witness is saying.¹¹ I find that the material point in the proffered evidence of Dr. Murphy does not go to the credibility or reliability of Dr. Zajc's opinions. While there may be areas where their evidence happen to confirm each other's opinion, the purpose of calling each witness is to enable them to offer their own independent proof as opposed to overlapping evidence directed to oath helping. I am of the opinion that the proffered evidence of Dr. Murphy is not barred by any other exclusionary rule such as the rule against oath helping.

IV. Is the Report of Dr. Murphy dated February 27, 2007 a Supplementary Report?

38 The defence submits that the said report is not a supplementary report. It was not served within the 90 days of the beginning of trial pursuant to rule 53.03(1) of the *Rules of Civil Procedure*. In that report, Dr. Murphy raises a new issue. At page 6 of the report, Dr. Murphy opines that Mr. Laudon is a serious medium-term and long-term risk for suicide.

39 The position of the plaintiff is that the issue is not new and the report is not supplemental.

40 Rather, the report falls within rule 53.03(3)(b).

41 I find that the report is supplemental and was served on March 8, 2007 within the 30 days set out in rule 53.03(3)(b). I find that the report was filed in time within the meaning of the rule and no extension or abridgement of time is required.

42 As for a new issue being raised in respect of the report, the issue of suicide is not a new issue but can be found in his first report of December 13, 2004. His second report dated July 29, 2005 is a response to Dr. Berry's report. It is submitted there is nothing about Mr. Laudon's condition. All three reports can be found at Exhibit "D" marked on this *voir dire*. For the foregoing reasons, I find that the plaintiff has complied with rule 53.03(3)(b) and leave is not required for Dr. Murphy to testify in accordance with said rule.

DISPOSITION

43 For the previous reasons stated, I find that Dr. Murphy is a properly qualified witness, and that his evidence is necessary within the meaning of *Mohan* and does not offend or violate any exclusionary rule such as the rule against oath helping. Further, Dr. Murphy's last report dated February 27, 2007 complies with rule 53.03(3)(b) of the *Rules of Civil Procedure*.

G.P. DiTOMASO J.

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1 [1994] S.C.J. No. 36 (S.C.C.)

2 *R. v. Mohan* (supra) at para. 27

3 *Dulong v. Merrill-Lynch Canada Inc.* (2006) [2006] O.J. No. 1146 (S.C.J.)

4 *R. v. J.-L.J.*, [2000] 2 S.C.R. 600 (S.C.C.) at para. 28

5 J. Sopinka, S. Letterman and A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths), [1999] at p. 623

6 *Taylor v. Sawh*, [2000] O.J. No. 257 (C.A.) at para. 21

7 *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 412-13 (S.C.C.)

8 1995 CarswellOnt 1360 (O.C.J. Gen. Div.)

9 David Paciocco, Lee Stuesser, *The Law of Evidence* (4th ed.) 2005 at p. 186

10 [2005] O.J. No. 929

11 Paciocco & Struesser, *The Law of Evidence*, supra, p. 179