Case Name:

Laudon v. Roberts

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

[2007] O.J. No. 1414

156 A.C.W.S. (3d) 844

49 C.P.C. (6th) 311

2007 CarswellOnt 2191

Barrie Court File No. 02-B5188

Ontario Superior Court of Justice

G.P. DiTomaso J.

Heard: April 12, 2007.
Judgment: April 17, 2007.

(35 paras.)

Civil evidence -- Opinion evidence -- Expert evidence -- Admission of reports -- Permissible range -- Inadmissible opinions -- Regarding findings of law -- Reports by expert in investigating boat accidents not admitted where reports went beyond area of expert's expertise in expressing opinions regarding liability of boaters involved in collision -- Expert was usurping role of triers of fact -- Evidence not necessary as accident was not so complex that triers of fact could not figure it out -- Admission of reports or testimony of expert would seriously prejudice defendant's case.

Application by Laudon for order permitting him to call Blanchet as expert witness -- Blanchet authored two reports which Laudon also sought to admit -- Sullivan objected to admission of reports as well as testimony of Blanchet -- Laudon's action arose following collision of Sullivan's boat with Roberts' boat -- Laudon was passenger in Sullivan's boat, and claimed he was injured as result of collision -- Blanchet was expert in field of investigation, causation analysis and accident reconstruction in respect of boat collisions -- Reports analyzed legislation, rendered opinions with respect to negligence of parties involved in collision as well as others not involved in litigation -- Concluded parties equally negligent, noting they each had last opportunity to decide it would have been unsafe

to operate their boats at night without proper navigation lights -- HELD: Application dismissed -- In reports, Blanchet attempted to usurp function of triers of fact by arriving at conclusions and findings with respect to negligence -- Reports not necessary, as mechanism of accident was not complex -- Triers of fact would be able to assess what each party knew or ought to have known regarding their respective duties and what options were available to them by using common sense -- No portion of reports could be saved by separating offending portions from reports, because they were so badly drafted in going beyond what Blanchet was qualified to give opinions on -- Admission of reports would have seriously prejudicial effect on Sullivan.

Statutes, Regulations and Rules Cited:

Canada Shipping Act,

Canada Shipping Rules, Rule 2, Rule 5, Rule 6, Rule 7, Rule 8, Rule 14, Rule 23

Counsel:

J. Ralston and D. Harris-Lowe, for the plaintiff.

E. Chatterton, for the defendant, Roberts.

M. Forget & L. Matthews for the defendant Sullivan.

RULING RE ADMISSIBILITY OF REPORTS

1 **G.P. DiTOMASO J.**:-- The plaintiff seeks to call as his expert witness at trial Mr. Ronald M. Blanchet of Marine Accident Services. Mr. Blanchet has authored two reports dated July 10, 2006 and July 24, 2006. The defendant Sullivan raised an objection in respect of both reports and the testimony of Mr. Blanchet at trial on the grounds that his testimony and reports are inadmissible.

OVERVIEW

2 The plaintiff Laudon is alleged to have sustained injuries as the result of a boating accident which occurred on August 2, 2002 on Bolger Lake. He was a passenger in a boat operated by the defendant Sullivan. The "Sullivan boat" came into collision with a boat operated by the defendant Roberts, being the "Roberts boat". Mr. Ronald M. Blanchet of Marine Accident Services was retained by plaintiff's counsel to provide an expert opinion in respect of this motor boat collision. In this regard, Mr. Blanchet authored two reports - namely a report dated July 24, 2006 and a subsequent report dated July 10, 2006. Said reports are attached to these Reasons. The report of July 10, 2006 is marked as appendix "A" and the report dated July 24, 2006 is marked appendix "B".

ISSUE

3 The issue is whether the two Blanchet reports and the testimony of the plaintiff's expert Ronald M. Blanchet are admissible at trial.

POSITION OF THE DEFENDANT SULLIVAN

4 The defence takes the position that the expert evidence which the plaintiff seeks to adduce does not meet the criteria prescribed by the Supreme Court of Canada for the admission of expert evi-

dence in *R. v. Mohan*, [1994] S.C.J. No. 36 (S.C.C.). Specifically, the necessity requirement has not been met. Further, the defence submits that Mr. Blanchet is not a properly qualified expert and it is further asserted that he has assumed the role of an advocate.

5 The defence submits that Mr. Blanchet's evidence is not necessary to assist the jury and that his conclusions are opinions on the law which he is not qualified to make. Moreover, his opinions on the law improperly usurp the function of the trial judge. Mr. Blanchet seeks to give opinion evidence in respect of matters of "common sense" that a jury can assess without the aid of expert evidence.

6 In his reports, Mr. Blanchet also answers the ultimate questions to be determined by the jury - the triers of fact in this case. It is for the jury to decide and to determine the ultimate questions of negligence and contributory negligence, if any in this case. Mr. Blanchet's opinions do just that in determining issues of negligence and contributory negligence which usurp the function of the jury.

7 In short, the defendant Sullivan submits that the entirety of Mr. Blanchet's reports and testimony are inadmissible as all fails to meet the criteria of necessity and proper qualification of an expert as required by *Mohan*, and shows evidence of improper advocacy in its reliance on selective evidence favourable to the plaintiff.

THE POSITION OF THE PLAINTIFF LAUDON

8 Counsel for the plaintiff concedes that there are portions of Mr. Blanchet's reports that are not proper. He should not be rendering opinions in respect of negligence or apportionment of negligence or contributory negligence. He should not be rendering opinions in respect of negligence of persons who are not even parties to these proceedings.

9 Rather, while the plaintiff does not seek to introduce the reports as exhibits, the evidence of Mr. Blanchet is necessary as it is relevant to the issue of causation given the existence or absence of boating or other lights. To this end, it will be necessary for the jury to learn of the statutory framework which is set out in the *Canada Shipping Act* and related rules and regulations. To this end, it is necessary for the jury to hear this evidence. Further, Mr. Blanchet will be called upon to answer a hypothetical based on the facts of this case drawn from Mr. Blanchet's reports. It is submitted that Mr. Blanchet's evidence is necessary.

10 In addition, it is submitted that Mr. Blanchet is not an advocate. He drew his information from all available sources including the evidence from the defendant Sullivan. All of those sources are set out in Mr. Blanchet's July 10, 2006 report. While Mr. Blanchet discusses issues of liability and renders his opinion in respect of negligence, apportionment of negligence and contributory negligence, he has not done so from a biased or partial point of view.

11 In reply, the defence took the position that there are no parts of the Blanchet report that can be parsed out. The reports cannot be dissected so as to segregate Mr. Blanchet's opinion in respect of causation. Again, his opinion is not necessary to assist the jury in determining that two unlit boats being operated without lights collided at night. No portion of Mr. Blanchet's reports can be admitted into evidence.

ANALYSIS

12 In *Mohan*, the Supreme Court of Canada stipulated that expert evidence will only be admitted where the following four criteria are all met:

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

13 Counsel for the defendant Sullivan concedes that some of the expert evidence is sought is relevant. The evidence contained in the reports as it relates to any possible exposure by the owners of the two boats is not relevant.

14 I have reviewed Mr. Blanchet's curriculum vitae attached to his July 10, 2006 report. I am satisfied upon reading the scope of his expertise in carrying out investigations, causation analysis and accident reconstruction particularly in respect of boat collisions, that he is an expert in his field.

15 The question comes down to whether Mr. Blanchet's reports and his testimony satisfies the *Mohan* necessity test in assisting the trier of fact in this case.

16 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.

17 Justice Sopinka also expressed a concern inherent in the application of the necessity criterion that experts not be permitted to usurp functions of the trier of fact. Too liberal an approach could result in a trial becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.[1]

18 Justice Sopinka went on to state that these concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue.[2]

19 In *Webb v. Waterloo (Region) Police Services Board*,[3] the Ontario Court of Appeal held that expert opinion evidence is admissible only when the trier of fact is unable to form his or her own conclusions on the issues in the case without help. The criteria for the admissibility of expert opinion evidence enunciated in *Mohan* was again reviewed at para. 11 in *Webb.*

20 At para. 12, the Court of Appeal in *Webb* held the issues upon which it was proposed that two witnesses would give opinion evidence fundamentally related to matters of law within the expertise of the trial judge that he was required to determine. In *Webb*, the Court of Appeal found not only were the proposed experts insufficiently qualified but the opinion evidence on the law was unnecessary to assist the trial judge. The criteria for admissibility had not been met.

The July 10, 2006 Report

21 At para. 1 on page 1 of the report, right from the very outset, Mr. Blanchet identifies that the "foregoing is an expert analysis and assessment of operator negligence". It is not his function as an expert witness to analyze and assess the issue of operator negligence. This is the ultimate issue for the triers of fact to determine.

22 Rather, I find that Mr. Blanchet usurps the function of the triers of fact and embarks upon just what he intended to do - arriving at conclusions and findings in respect of who was negligent or at fault in this case and, even further, in what proportions.

23 He analyzes the various provisions of the *Canada Shipping Act* which incorporates the small vessel regulations and the collision regulations. He analyzes rules 2, 5, 6, 7, 8, 14 and 23 under the regulations. He interprets those rules and applies them to the facts as he finds them in this case. The reports read very much like reasons for judgment. In presenting his reports in this way, Mr. Blanchet has usurped both the functions of the trial judge and the triers of fact - the jury.

24 However, Mr. Blanchet does not stop there. He also renders opinions in respect of contributory negligence regarding the boat owners who are not even parties to this litigation.

25 Mr. Blanchet concludes that the operator of each boat is equally negligent by failing to exercise sound judgment and common sense in the circumstance.

The July 24, 2006 Report

26 In this report, Mr. Blanchet reaffirms his conclusion that the two operators were equally negligent for failing to fulfill their obligations and even goes on to suggest that there were other lines of questioning that could have been pursued in Mr. Roberts' examination for discovery regarding the non-functional navigation lights on the Roberts boat.

27 At para. 3 of the report, he renders an opinion that contributory negligence definitely rests with the owners of the boats for failing to ensure each vessel was properly equipped with functional navigation lights.

28 In the second last paragraph at page 2 he re-asserts that the defendants were equally at fault for the accident because they had the last opportunity to decide that it would be unsafe to operate their vessels at night and without proper navigation lights or a light of any kind whatsoever. Again, it is for the jury to decide the issue of fault and apportionment, if any, and contributory negligence, if any. It is not for Mr. Blanchet to decide the ultimate question in either his July 24, 2006 report or his previous report of July 10, 2006.

29 While Mr. Blanchet has an expertise in rendering opinions regarding boating collisions, as evidenced by his curriculum vitae, in no way can he be qualified as an expert to give the kinds of opinions that he rendered in his two reports. The opinions expressed in those reports do not fall within the ambit of a properly qualified expert. Rather, he has rendered opinions beyond his area of expertise and has intruded into the exclusive roles of the trial judge and jury which he is not permitted to do.

30 As for necessity, I am not persuaded that Mr. Blanchet's reports and evidence would be required to assist the triers of fact in this case to appreciate the matters in issue due to their technical nature. The mechanism of the accident is not complex. There is evidence before the jury from P.C. Holloway that the two boats without navigation lights collided head on in the dark. The jury can assess without the aid of expert evidence what each party knew or ought to have known regarding their respective duties and what options the parties could have undertaken to avoid the accident. These issues are matters of "common sense" that a jury can determine without the assistance of any expert evidence coming from Mr. Blanchet. Further, the jury will be instructed on the law by the trial judge.

31 I wish to turn briefly to the question of whether Mr. Blanchet is an advocate in this case.

32 I agree with the comments of Justice Farley in *Bank of Montreal v. Citak*[4] where experts must be neutral and objective. To the extent that they are not, experts are not properly qualified to give expert opinions. Further, experts must not be permitted to become advocates. I concur with the comments of Justice E. McDonald referred to by Justice Farley with approval found at para. 6 in *Citak*.

33 In this case, Mr. Blanchet has reviewed all of the documentation set out in paragraph 1 of the July 10, 2006 report including the examination for discovery of all of the parties along with Will Say Statements, the pleadings, the O.P.P. reports and photos. He states that his opinions and conclusions expressed in his report are impartial as well as objective based on a careful review of those materials. The facts in our case are distinguishable from those in *Citak*. Nevertheless, what has happened is that his reports go far beyond what any qualified expert would be allowed to express by way of opinion for the reasons that I have previously given. While I do not find Mr. Blanchet to be an advocate disguised as an expert, his reports are so badly drafted that no portion of them can be saved or excised including any portion of those reports that may speak to causation. When both reports are read in full context, they cannot be dissected or parsed to separate the offending portions of the report from anything that could pass for legitimate opinion.

34 I specifically reject the submissions made by counsel for Laudon regarding how a hypothetical could be constructed from elements of these reports and put to Mr. Blanchet if he were permitted to testify after the offending portions of the reports have been set aside. I disagree. The reports go too far. They do not meet the necessity test and, in part, the relevance test as set out in *Mohan*. They are also outside the scope of Mr. Blanchet's qualified expertise. I also find the same to be true in respect of Mr. Blanchet's proposed testimony. Lastly, I conclude that the admission of any of the unnecessary evidence derived from Mr. Blanchet's reports and his proposed testimony outweighs the probative value of such evidence. To admit such unnecessary evidence would have a serious prejudicial effect on Mr. Sullivan.

Disposition

35 For these reasons, I rule that Mr. Blanchet's reports dated July 10, 2006 and July 24, 2006 as well as his testimony are inadmissible.

G.P. DiTOMASO J.

cp/e/qlgxc/qlmxt/qlbrl

1 *R. v. Mohan, supra,* at para. 24.

2 *R. v. Mohan, supra* at para. 25.

3 [2002] O.J. No. 2515.

4 [2001] O.J. No. 1096.