IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20121123
Docket: M112159
Registry: Vancouver

Between:

Cindy Louise Combs

Plaintiff

And

Kirby Lloyd Bergen

Defendant

Before: The Honourable Mr. Justice Steeves

Oral Reasons for Judgment

Counsel for Plaintiff:	S.T. Cope
Counsel for Defendant:	P.B. Seale
Place and Date of Trial/Hearing:	Vancouver, B.C. November 23, 2012
Place and Date of Judgment:	Vancouver, B.C. November 23, 2012

[1] **THE COURT:** The defendant seeks to admit an expert report as a response report under Rule 11-6(4). This is the report of Dr. Reebye, dated October 3, 2012.

[2] The plaintiff opposes the admission of this report in its entirety. The plaintiff says the report of Dr. Reebye should have been submitted under Rule 11-6(3) as an original or first report and it is not a response report at all.

[3] I set out Rule 11-6(4) as follows:

> Unless the Court otherwise orders if a party intends to tender an expert report at trial to respond to an expert witness whose report is served under sub-rule 3, the party must serve on every party of record, at least 42 days before the scheduled trial date, A, the responding report, and B, notice that the responding report is being served under this rule.

[4] Rule 11-6(4) is to be contrasted with 11-6(3). The latter provides for what might be called, in the context of a response report, a first expert report. Rule 11-6(3) provides for an 84-day notice period and there is no dispute it contemplates a broad scope for an expert under Rule 11-6(3). The plaintiff submits that the disputed response report of Dr. Reebye should have been submitted under this Rule.

[5] Counsel argued this issue in some detail and scope and cited numerous cases. I will review too some points taken from those cases as they are useful.

[6] Prior to the current Rule 11 the situation (under then Rule 40A) was that response expert reports could be submitted up to and even during a trial. (*Stainer v. ICBC,* 2001 BCCA 133). The intent of Rule 11-6(3) and (4) appears to end that practice. There is a right to a response report but it must be submitted 42 days before trial. (I note the Court can order otherwise).

[7] A number of previous judgments were provided to me. Given the wide range of subject matters that experts can be used for, it is not possible to definitively outline what is a response report; however, there is some useful points that can be taken from these cases and in my view they are as follows:

a) There is a value in the exchange of expert opinions. This facilitates a narrowing of the issue or issues that the experts

have been retained to review. This puts the parties on what has been called an "equal footing" when they properly submit their independent expert reports. (*Stainer* cited in *Luedecke v. Hillman*, 2010 BCSC 1538 at para 31)

b) There are also constraints on expert reports. The notice period is an obvious one.

c) Response reports have always had different constraints from other expert reports. Under the previous Rule 40A a party was limited to "true responsive evidence" in reply. Opinion evidence could not "masquerade" as a fresh answer" to the other side's experts. (*Kroll v. Eli Lilly Canada Ltd.* (1995) 5 BCLR (3d) 7; *Luedecke* at para 26). This remains the situation under the current Rule 6-4 and, indeed, that Rule can be seen as a codification of the previous practice.

d) It seems self-evident that a response report under Rule 11-6(4) is a reply to a previous report under Rule 11-6(3). A response report has previously been described as intended to apply only to evidence that is truly responsive to specific opinion evidence tendered by the opposite party. It is not intended to provide defendants with a general exemption from the basic time limit for serving expert reports that is set out in 11-6(3). (*Stainer* at para 15).

e) Defendants who delay obtaining or serving expert evidence until after the plaintiff's opinions have been received, then attempt to introduce new expert evidence in response, do so at their peril. (*Crane v. Lee,* 2011 BCSC 898 at para 22).

f) The new Rule 11-6 includes an expectation that substantive issues such as, for example, diagnosis will be set out in expert reports under Rule 11-6(3). That Rule permits a full opinion without the restrictions under Rule 11-6(4).

g) There are previous decisions that have concluded a response report under Rule 11-6(4) cannot be diagnostic in nature (for example, *Hamilton v. Demandr,* 2010 BCSC 1914).

h) I would add one clarification to these decisions so that the court has a valid diagnosis before it. There can be situations where a diagnosis is given in a report under Rule 11-6(3) and that diagnosis is challenged in a response report under Rule 11-6(4). The challenge would be just that: an explanation why the first diagnosis is wrong or incomplete and an explanation why a different diagnosis is appropriate. In most cases exchange of pleadings and disclosure of medical reports will prevent this situation from arising. A party relying on the relatively restricted

nature of a response report for a different diagnosis would do so at its peril.

i) I note that a response report is sometimes also referred to as a rebuttal report. However, a Rule 11-6(4) report is not rebuttal evidence as "generally understood." It is evidence that is purely responsive. (*Stainer* at para 15).

j) In some cases it is a plaintiff who seeks to admit a response report after seeing a Rule 11-6(3) report and receiving it from the defendants. The situation as described in the cases is not an opportunity for the plaintiff to split its case (*Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 OR 18); *Luedecke* at para 340).

k) There is a threshold for the need of a report under Rule 11-6(4) inasmuch as a party "must establish a basis of necessity" for the report. It must be a proper response to a report under 11-6(3) (*Luedecke* at para 54).

[8] In my view, a response report under 11-6(4) can properly be characterized as an answer. An answer generally responds to a question. I conclude that a response report must be one that genuinely engages with a report under Rule 11-6(3). A response report is truly responsive to the Rule 11-6(3) report and it does not stand alone as fresh evidence. It can provide a "critical review" (*C.N. Railway v. R.*, 2002 BCSC 1669 at para 26) of the methodology of a Rule 11-6(3) report and it can provide an alternative view of an issue addressed in a Rule 11-6(3) report. A response report is limited in scope compared to a 11-6(3) report. It is not an opportunity to avoid the requirements of Rule 11-6(3) and permit a party to provide a free-standing opinion or wide-ranging review of the facts, independent of the Rule 11-6(3) report as being responded to.

[9] I turn now to the report that is the subject of this application and that is Dr. Reebye's report of October 3, 2012.

[10] He was retained by the defendant and his report was served on the plaintiff under Rule 11-6(4). That is, it was served as a response report and not a report under Rule 11-6(3). The plaintiff says that Dr. Reebye's report is one properly under Rule 11-6(3) and, therefore, it was served well beyond 84 days required in that Rule.

[11] The facts of this case involve a December 2009 motor vehicle accident in which a vehicle driven by the plaintiff was rear ended by the defendant. The plaintiff claims a number of heads of damages including future care, massage therapy, physical therapy, a gym pass and matters such as housekeeping.

[12] Counsel for the defendant produced written instructions to Dr. Reebye on September 17, 2012. A number of documents were provided and Dr. Reebye was requested to provide "a report responsive to" the reports of four experts retained by the plaintiff. These were three doctors and one occupational therapist.

[13] I am urged on behalf of the plaintiff to find that there was an obligation on counsel under Rule 11-6 to provide specific direction to an expert who is retained for a report under Rule 11-6(4). I do not find that requirement in Rule and nor do I find it is an appropriate one. Counsel's instructions to an expert are obviously relevant to determining if a report is a responsive one or a fresh opinion. However, in my view, it is the actual report of the expert that is determinative of the issue.

[14] The plaintiff has identified thirty-one parts of Dr. Reebye's October 3, 2012, report that are characterized variously as free-standing medical opinions, non-responsive comments on treatment and some are characterized as based on no foundation at all. Others are described as Dr. Reebye simply theorizing and are, therefore, not appropriately part of a Rule 11-6(4) report.

[15] I will review two examples of the parts of Dr. Reebye's report that are challenged. At page 3 Dr. Reebye refers to a medical report from the plaintiff's family physician. Dr. Reebye states that he "agrees" with the report "except" for the statement by the family physician about an "expectation that she will never become symptom free." Dr. Reebye then proceeds to give the following reasons.

> In my opinion there is no evidence to cause concern that Ms. Cindy Combs [the plaintiff] will never become fully symptom free and given negative feedback she will never be symptom free.
>
> In my experience the vast majority of patients become symptom free after the type of injury sustained by Ms. Combs in the motor vehicle accident.

[16] A functional capacity evaluation was done to assess the plaintiff on August 24, 2012. The occupational therapist who did this provided an expert report of the same date. In his report Dr. Reebye stated that the plaintiff's difficulties in performing some of the tests were understandable because the plaintiff was deconditioned. The plaintiff does not object to this statement.

[17] The occupational therapist recommended a number of things, including ongoing housekeeping for the plaintiff. With respect to this Dr. Reebye said the following in his October 3, 2012, report.

> In my opinion, housekeeping services are to be discouraged for long term as it would prolong her feeling of disability. The goal of rehabilitation in this case is to help Ms. Combs become independent of others and normalize her life.
>
> Housekeeping
>
> Brief periods of assistance will be useful in case she is doing new activities or increasing her present activities and finds it difficult. In my opinion, it is counterproductive to provide housekeeping services in this case for prolonged periods.
>
> Seasonal Housekeeping.
>
> In my opinion, Ms. Combs will in the long run be able to do whatever housekeeping activities she used to do previously. She will experience increases in pain when doing activities that she has not done for several months. This is common and known as recreational pain. The strategy is to do new activities in amounts that she is comfortable with and spread tasks over a longer time rather than pushing herself too much or to do too much of unusual activities at one go. The plaintiff objects to this comment and opinion by Dr. Reebye.

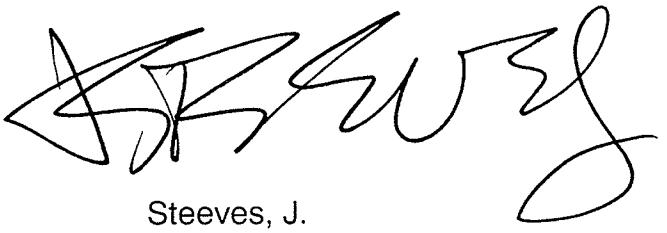
[18] As I review the comments objected to by the plaintiff in Dr. Reebye's report, they are all of the same character. As another example, the occupational therapist recommended a grab bar in the plaintiff's bathroom and Dr. Reebye stated "useful for safety, but not specifically for injuries sustained."

[19] With regards to a laundry count-and-sort Dr. Reebye said "Temporarily useful she if feels need for it at present. However, it is not needed for injuries sustained in 2009."

[20] I am also urged by this plaintiff to reject these comments as not responsive.

[21] Overall, I conclude that Dr. Reebye's report is one that is responsive to the reports he was asked to review. I find that he was genuinely engaged in replying to those reports as evidenced by the format of his report and by its substance. Bearing in mind that, at this stage, I am in no way agreeing or disagreeing with Dr. Reebye, I find his October 2, 2012, report is a critical review of the previous reports. The fact that he presents alternative views and different conclusions, and the fact that he expresses this in the form of his "opinion" does not lead to a conclusion that he was presenting a new free-standing opinion.

[22] For these reasons I dismiss the plaintiff's application that Dr. Reebye's report of October 2, 2012, is not a response report under Rule 11-6(4).



Steeves, J.