Updates · Professional Corner · Book of the Month

Updates

Message from the Board of Directors

Welcome to the fall issue of Kinnected. Fall means Kinesiology Week is quickly approaching – it will run from October 19th to the 25th. This year we are sponsoring a community event in the Fraser Valley in conjunction with the University of the Fraser Valley – KPESA on October 17th, 2014. which will promote the benefits of kinesiology services to UFV students, faculty and the local community. There will be tours of the test labs and free health and wellness testing. For further information on the event please contact the UFV-KPESA.

An online professional development event for members is also being planned. Information will be made available shortly – please watch your email for further details.

Professional Practice Standards

The BCAK's Professional Practice Standards have been updated as of September 2014. The changes incorporated are minor and reflect:

- Recent legislative changes (updating of the Limitation Act) as it relates to the retention of client records;
- Recognition of societal standards/expectations as they relate to infection control and disease prevention in the work place;
- Compliance with all levels of government legislation regarding taxation, remittances and licencing.

We encourage members to familiarize themselves with the standards, as they can provide valuable guidance in regards to what would be expected of a "reasonable" kinesiologist by the public and in the eyes of the courts.

Scope of Practice

The BCAK Practicing Member scope of practice is in the process of being amended (broadened) to reflect the recent changes to the scope of practice in Ontario following regulation of the profession in April of 2013.

GET PUBLISHED.
Write a review of any books, research, events, courses,

Member Benefits

- Insurance
- Book of the Month Club
- Kinnected Newsletter
- eHealth Library
- BCBusiness All-Access Pass
- Physiotec
- Networking

FIND A KINESIOLOGIST

BECOME A MEMBER

JOB POSTINGS

Kinnected: Fall 2014

Recent Judicial Commentary on the Preparation of Expert Reports in Supreme Court Proceedings

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The Issue

I have written several previous articles in *Kinnected* that have addressed the interesting issues of the use (and abuse) of expert evidence in the context of bodily injury civil claims. The use of expert reports in the context of bodily injury claims is indeed a critical component to both the prosecution and defence of bodily injury claims. Expert reports are relied upon by the trier of fact (the trial judge in a judge alone trial, or a jury in a jury trial). Unfortunately, this subject area can also be an area that can be misunderstood by both expert witnesses and lawyers alike.

There are many aspects of the experts' role in legal proceedings that can be taken for granted, or dealt with improperly. In a recent Supreme Court of British Columbia case where the trial Judge (the Honourable Mr. Justice Abrioux), was confronted with some of these issues. In response, the learned Judge provided some insightful judicial commentary on the use of expert witnesses in the context of bodily injury claims and the corresponding use of expert reports in such proceedings.

The *Maras* Case

Maras v. *Seemore Entertainment Ltd.*, 2014 BCSC 1109, is a recent Supreme Court of British Columbia civil jury trial that arose in the context of a bodily injury case. The trial in *Maras* was set to proceed for 40 days with a civil jury, commencing in the Spring of 2014. At a pretrial proceeding, there was a direction that a application be held prior to the commencement of the trial that pertained to the admissibility of certain expert reports obtained by the parties. The jury rendered its verdict in early June 2014, and with the matter concluded, the Court subsequently released its Ruling on the Admissibility of Expert Reports.

In his Ruling, the Judge that presided over the jury trial (the Honourable Mr. Justice Abrioux), prepared a written "Ruling on the Admissibility of Expert Reports" that thoroughly reviews the established evidentiary principles, legal authorities and applicable *Supreme Court Civil Rules* that surround the use of expert reports in bodily injury proceedings.

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The Court's commentary was made in the context of making an admissibility ruling in during the course of the trial on the Admissibility of Expert Reports sought to be tendered by the parties in the litigation. The case will be discussed below to seek to highlight the salient purpose of such reports and provide some brief commentary with respect to how to ensure the report will seek to assist the trier of fact and seek to prevent the report from being ruled inadmissible at trial.

As a way of background, the *Maras* claim related to a civil assault bodily injury claim that was alleged to have occurred "at or near" a Vancouver nightclub in 2009. The alleged assault was alleged to have resulted in the Plaintiff sustaining a serious head injury.

In many respects, the judicial commentary in *Maras* is similar to previous decisions / legal authorities from both the Supreme Court of British Columbia and the Supreme Court of Canada in relation to its review of the legal test and considerations for the admissibility of expert reports. However, what is perhaps novel about the *Maras* decision, is that in the Ruling the Court individually reviews each of the impugned expert reports and directs how each report should be prepared (or be re-written) to be admissible in the trial, with a view to assisting the tier of fact.

The Ruling in *Maras* serves as another cogent reminder to both the lawyers involved in the requesting of such reports and the experts that prepare them, in relation to what is required in this context.

It is beyond the scope of this article to review the Court's discussion of the well-established legal test and authorities in relation to the evidentiary and other considerations with respect admissibility of expert reports. However, the Court's review and discussion of such legal principles may be found at paras. 9-20 of the Ruling. The Ruling may reviewed in its entirety at the following hyperlink*: Maras v. Seemore*.

One of the issues at the center of several of the impugned expert reports in *Maras* was the length of several of the reports, as well as the perceived blurring of the line between the experts' respective opinions and the underlying facts and assumptions relied upon by the expert in arriving at the opinion. The Court also comments on the tendency in several expert reports to "editorialize" on patient treatment records and other expert reports.

Such issues were considered to make it somewhat difficult it was for the trier of fact to readily ascertain the experts' respective expert opinions from several of the reports. On this issue, the Court had the following to say about several of the reports:

> They contain lengthy appendices and schedules, including detailed summaries of various interviews which were conducted. In some instances, they also contain voluminous summaries of or comments on the documents and reports which the expert has reviewed. With respect to these latter reports, **it will be difficult, and at times impossible, for the trier of fact to differentiate between the assumed facts and the expert's opinion**. The process is further complicated when the report contains argument under the guise of opinion, or opinion beyond the expertise of the expert. [emphasis added] [at para. 22]

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The Court also expressly endorsed the practice adopted by many experts, wherein the author of the report will include a glossary of scientific or technical terms as an appendix to the report. For example, in the case of medical-legal reports, the inclusion of a description of prescription medication, what it is prescribed for, potential side effects, and related matters, in order to assist the trier of fact. As the Court notes, assisting the trier of fact is the purpose of expert evidence in the first place.

Summary

The Supreme Court of Canada has emphasized in prior cases that the trial judge should take seriously his or her role of "gatekeeper" with respect to the admissibility and use of expert evidence at trial. Consequently, we can expect that expert reports that are considered to run contrary to the purpose of such evidence can be expected to continue to be challenged with respect to admissibility.

So what can the Kinesiologist who has been asked to prepare a medical-legal report on a patient take from the recent judicial commentary in *Maras* v. *Seemore*? Below is a list of some of the "do's and don'ts" set out by the Court:

- Do keep your report and any attached schedules or appendices short and to the point – only include what is relevant and necessary to assist the trier of fact in the report itself. Any appendices to the report should be streamlined and only include what is necessary for the formulation of your opinions and/or the facts and assumptions upon which your opinions are based

- Don't include a detailed summary of your interview of the patient, or commentary on documents provided to you in the body of the report (unless there is a specific purpose for doing so, which specifically relates to the underlying facts and assumptions or your opinions)

- Do feel free to prepare longer schedules or appendices on such matters such as record review, or commentary of others' opinions (if considered necessary), but ***do not include these as part of your report***. Instead, such documents ought to be part of your expert file (just like your clinical records or assessment notes), for eventual production in the ordinary course (upon receiving a request for your file from counsel)

- Do clearly differentiate between assumed facts and your opinions – the use of headings your report in relation to the categorization of such matters ought to be encouraged

- Do avoid making arguments in the guise of expert opinion – this is neither helpful, nor necessary and may result in an otherwise helpful expert report being ruled inadmissible in its entirety

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- Do include a glossary of “scientific or technical terms” as an appendix to your report (if considered necessary)

Steps taken by both counsel and experts involved in such cases to be mindful of the foregoing and seek to simplify the important function that expert reports have in bodily injury litigation to assist the trier of fact and to ensure that the all-important “trees” are not lost in the proverbial “forest”, ought to be undertaken and steadfastly encouraged.

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