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BCAK Update from the President

Welcome to the latest edition of *Kinnected*. Our focus as always is to provide you with relevant information that enhances your professional competency, best practices and business skills. First, a few notes on the BCAK.

The BCAK directors and support staff direct most of their efforts towards delivering and enhancing the message that BCAK Practicing kinesiologists are capable of providing quality, competent and professional service to the public. This message of confidence allows employers and the public to trust in the value of membership, and can eliminate the need to conduct extensive background investigation into a kinesiologist's education, skills and integrity. The process of achieving this goal is complex and multifaceted, including consulting and listening to:

- Government officials
- Companies and organizations that hire kinesiologists (both large and small)
- Universities who produce kinesiology graduates, and
- The general public who consume kinesiology services.

The combined input from these and other stakeholders allows us to assess the demand for kinesiology services and how/if kinesiologists are competent to provide the service(s).

[Read more from the President here.](#)

Professional Development

We are working to provide you with new continuing education presentations geared toward medical report writing and communicating with adjusters and case managers. These presentations will focus on how to identify and meet their reporting needs, and the art of selling your treatment plan to the adjuster/case manager. The courses will be of particular interest to new members and those who have not worked in the field of rehabilitation but wish to do so. The content is being developed with extensive input from adjusters and case managers at the crown corporations (WorkSafe BC and ICBC), the public health authorities, and private insurers. These courses should be available through the members-only section of the website in early in 2018 and will be free to members. We will notify you by email once these training presentations/courses become available on the BCAK website.

Marketing Events

Click here to read the
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Reviewing the Scope of Evidence Admissible from a Treating Witness at Trial: a Recent Case Review

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Issue

It has long been established that treating professionals, such as family physicians and kinesiologists, can provide expert evidence in court in accordance with the expert evidence requirements of Part 11 of the *Supreme Court Civil Rules*. This is generally referred to as "expert opinion evidence," and such evidence is generally provided in the form of a written expert report and is required to be in conformity with the formal and substantive requirements of the *Supreme Court Civil Rules* and other applicable statutory and common law requirements¹.

However, the use of treating experts to provide evidence in court where an expert report has not been sought to be tendered by a party in accordance with the expert report requirements under the *Supreme Court Civil Rules* is an often misunderstood area in terms of the general admissibility of such evidence; and by extension, there can be corresponding confusion in terms of the scope of evidence that may be provided in court by a treating professional at trial.

This brief article will seek to review a recent Supreme Court of British Columbia decision, which sets out the permissible scope of the testimony of the treating professional, within the context of the evidentiary limitations of the tendering of evidence from the treating professional in legal proceedings.

Discussion

A recent Supreme Court of British Columbia case has once again reviewed the applicable law in this important, but unfortunately often misunderstood area, in terms of the admissibility limitations and benefits of admitting a treating clinician's evidence for court purposes and in appropriate circumstances.

In *Cambie Surgeries Corporation v. British Columbia (Attorney General)*², the Court was asked to consider issues among the parties with respect to the scope of evidence given by doctors who were not certified as "experts" under the applicable provisions of the *Supreme Court Civil Rules*. The Court was then asked to essentially determine where the "line ought to be drawn" in terms of evidence which is admissible as a "certified expert" and, in contrast, evidence which is being proffered where the doctor has **not been certified** through the tendering of an expert opinion in

the form of an expert report in compliance with the formal and substantive requirements of the *Supreme Court Civil Rules*.

The facts and circumstances of the *Cambie Surgeries* case are indeed somewhat unique. However, the Court provides a useful and interesting judicial commentary on this subject and once again reviews the law in the area in a very brief and succinct oral ruling regarding the testimony of physician witnesses in legal proceedings. The Court's judicial commentary in this case can certainly be argued to have direct applicability in relation to other witnesses within the health care system, such as treating kinesiologists.

In the *Cambie Surgeries* case, the Court reviews the long-standing law that clinical records remain evidence of the fact that the clinician in the ordinary course of practice made the notes, made the diagnosis, and prescribed a certain form of treatment. The Court makes reference to the well-established view that "opinions" contained in the clinical records **do not constitute independent stand-alone expert opinions**. It is not the opinion in the clinical records that the court is weighing.³ If they did constitute stand-alone expert opinions, the legal authorities in this area have queried, "what would be the purpose of the expert report provisions of the *Supreme Court Civil Rules*?"

However, in the *Cambie Surgeries* case, the Court also provides judicial commentary in relation to a less traditional second category of evidence that arises when a treating professional who is not certified as an expert provides evidence in relation to his or her own practical clinical experience.

As the Court states at paragraph 14 of the *Cambie Surgeries* case, "this is part of the everyday experience of important actors in the healthcare system and it can be of value to the Court." The Court goes on to state that another related category of evidence is testimony from a treating professional (i.e.: a witness not certified as an "expert"), who testifies about **his or her observations as to a patient's situation**. The Court states that these observations can be about a patient being in pain, having restricted movements, not being able to work, being anxious and/or depressed, and other matters. The Court states the following in terms of the scope of such "factual" evidence:

[15] ... The fact that the witness is a doctor is relevant inasmuch as he or she may use medical language to describe his or her observations. But I see no difference for the purposes of admissibility with a non-doctor testifying about an accident where the victim was bleeding from the leg and a doctor saying the same victim was bleeding from the carotid artery.

[16] I acknowledge there is an element of opinion in this type of evidence. However, it has been the case for some time that distinctions between fact and opinion can be tenuous and even false [case citation omitted].

However, it must be kept in mind that the scope of admissibility of evidence from such treating professionals who have not tendered a formal expert report under the *Supreme Court Civil Rules* will be limited to matters in terms of general factual or observational matters, and the treating professional will generally not be permitted to stray into the realm of what is considered to be truly expert opinion evidence and to opine on matters that equate to expert opinion evidence, as contemplated by the *Supreme Court Civil Rules*, such as opinions in relation to medical causation or patient prognosis for recovery. The Court succinctly describes this limitation in the following passage:

[23] In my view that is an issue that is at the heart of this litigation and ultimately for me to decide. There can be evidence on that issue that would certainly assist the court, but in my view it must be evidence in the form of an expert. To be clear, evidence on that issue or similar issues from a doctor testifying without being certified as an expert is not admissible. ... Again, these conclusions are for the court to make based on admissible evidence including observations by physicians, expert reports and evidence from patients.

Summary

Unfortunately, there often remains a general reluctance of parties to seek to call factual or observational evidence from treating professionals, such as kinesiologists, at trial. There also seems to be a corresponding reluctance on the part of treating professionals to become fully engaged in the court process in terms of their clinical treatment of a patient.

Ironically, it is this type of witness that very often has a significant amount of very useful cogent observational and factual evidence in terms of the patient's status, therapeutic treatment and response to such treatment that will often provide significant assistance to the Court. As was well stated by The Honourable Mr. Justice Steeves in the *Cambie Surgeries* case, "this is part of the everyday experience of important actors in the health care system and it can be of value to the court".

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- ¹ See e.g.: *Evidence Act* and *R. v. Mohan* requirements, etc.
- ² *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2016 BCSC 1896
- ³ See *Ares v. Venner*, as quoted in *Seaman v. Crook*, 2003 BCSC 464, at para. 10