Davies v. Clarington (Municipality), [2016] O.J. No. 5522

Ontario Judgments

Ontario Superior Court of Justice

M.L. Edwards J.

Heard: May 24-26, June 1, 2, October 21 and 22, 2016.

Judgment: October 25, 2016.

Court File No.: 1075/2000

[2016] O.J. No. 5522 | 2016 ONSC 6636

Between Bonnie Davies, Plaintiff, and The Corporation of the Municipality of Clarington, VIA Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Transportation Services Inc., Blue Circle Canada Inc., and Hydro One Networks Inc., Defendants

(54 paras.)

Case Summary

Civil litigation — Civil evidence — Opinion evidence — Expert evidence — Admission of reports — Basis for opinion — Criteria of admissibility — Qualification as an expert — Application by plaintiff to qualify chartered accountant as expert witness dismissed — Plaintiff claimed past and future wage loss, which was complicated by fact he claimed income was paid largely in cash and undocumented — Witness did little more than simply rely on plaintiff's evidence of what he was paid — Witness did not retain documents, drafts or notes, met with plaintiff during trial contrary to court's direction, accepted plaintiff's word about income over contractual language to the contrary — Witness did not use expertise as accountant in proffering opinion, utterly failed in establishing objectivity, and his evidence not necessary.

Damages — Types of damages — General damages — For personal injuries — Loss of earning capacity — Special damages — Past loss of income — Loss of profits — Application by plaintiff to qualify chartered accountant as expert witness dismissed — Plaintiff claimed past and future wage loss, which was complicated by fact he claimed income was paid largely in cash and undocumented — Witness did little more than simply rely on plaintiff's evidence of what he was paid — Witness did not retain documents, drafts or notes, met with plaintiff during trial contrary to court's direction, accepted plaintiff's word about income over contractual language to the contrary — Witness did not use expertise as accountant in proffering opinion, utterly failed in establishing objectivity, and his evidence not necessary.

Damages — Assessment of damages — Difficulty in assessment — Application by plaintiff to qualify chartered accountant as expert witness dismissed — Plaintiff claimed past and future wage loss, which was complicated by fact he claimed income was paid largely in cash and undocumented — Witness did little more than simply rely on plaintiff's evidence of what he was paid — Witness did not retain documents, drafts or notes, met with plaintiff during trial contrary to court's direction, accepted plaintiff's word about income over contractual language to the contrary — Witness did not use expertise as accountant in proffering opinion, utterly failed in establishing objectivity, and his evidence not necessary.

Application by the plaintiff to qualify the chartered accountant as an expert witness. The plaintiff was a member of a class action that asserted claims arising from a train derailment. A substantial part of the plaintiff's claim was

for past and future wage loss, but it was complicated by the fact he claimed to have been paid largely in cash and his income was not documented. The defendant accepted the witness was an expert in the field of accounting, but did not accept he was properly qualified under Rule 53.03. The witness prepared three reports that purported to determine the plaintiff's earnings, but the plaintiff asserted only the most recent one was relevant as the other two were preliminary. The defence argued the analysis was not independent.

HELD: Application dismissed.

At the completion of his examination in chief, the plaintiff was warned by the court not to discuss his evidence with anyone. Despite this, he met with the expert several times as the expert prepared his 2015 report. This did not automatically exclude the evidence, and there were still the earlier reports to consider. The witness did not have access to any of the plaintiff's Polish tax returns prior to 1999. The plaintiff provided the expert with a spreadsheet that did not include all relevant items. The witness kept no notes of his discussions with the plaintiff and did not keep the spreadsheet. Contracts that purportedly supported the plaintiff's claimed income were not retained. The witness was cross-examined about his earlier 2007 report, and the source documentation almost entirely did not disclose income, so the inescapable conclusion was that most of the information came directly from the plaintiff. While the witness made it clear in evidence the 2007 report was preliminary, nothing in the report indicated this, and he did not retain drafts or documents relied on. The 2007 report was a regurgitation of the plaintiff's evidence and the court could not rely on it as independent. The witness also relied on evidence from the plaintiff's Polish lawyer, who was not present when monies were received and could not properly corroborate the plaintiff's evidence. The witness's responses left the impression he did not have a good hands-on knowledge of the facts relied on in the report. It became apparent there was more than one version of the 2011 report, but the witness could not explain why, and copies of drafts were not kept. As a professional accountant trained in the U.K., it was inconceivable that he came to court without notes, working papers or source documents. The witness's objectivity was further in doubt given his acceptance of the plaintiff's evidence on payment when it was contrary to that stated in a written contract. Relevance was a threshold requirement, and evidence on the plaintiff's past and future wage loss was clearly relevant. The court had heard the plaintiff's evidence on what he said he had been paid, and it was the role of the court to assess the plaintiff's credibility. Had the witness done something more than merely rely on what the plaintiff said he earned, his evidence may have been necessary to assist the court in determining the plaintiff's wage loss. The witness did not use his expertise as an accountant in proffering his opinion, and he utterly failed to establish the basis threshold objectivity, so was not a properly qualified witness.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 53.03

Counsel

Jeffrey W. Strype and Kyle Smith, for Class Member Zuber.

James Regan, Q.C., and Angelo Sciacca, for the Defendants Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Timothy Garnham.

Weston Pollard, for the Defendant Hydro One Networks Inc.

David Merner, for the Defendants VIA Rail Canada Inc. and Canadian National Railway Company.

Alon Barda, for the Defendant BLM Group Inc.

RULING REGARDING ADMISSIBILITY OF EXPERT EVIDENCE

M.L. EDWARDS J.

1 The Plaintiff seeks to qualify as an expert witness, Mr. Joseph Smoczyneski (Smoczyneski). Krysztof Zuber (Zuber) is part of a class action and asserts his claim arising out of injuries suffered in a VIA Rail derailment that occurred in November 1999. A significant part of his claim is his claim for past and future wage loss. Complicating that part of his claim is how to quantify the loss, given the vast majority of what he was allegedly paid was paid in cash and is not documented in income tax returns or banking records.

2 Smoczyneski is a chartered accountant who did his professional training in the United Kingdom. He became an associate of the Institute of Chartered Accountants and later became a Fellow of the Institute. Smoczyneski began his professional career in England and later moved to Poland in 1989.

3 The defence accepts that Smoczyneski is an expert in the field of accounting, but does not accept that he is a properly qualified expert under Rule 53.03 of the *Rules of Civil Procedure*. As such a *voir dire* was conducted, and with the agreement of counsel the evidence of Smoczyneski in the *voir dire* will apply to the trial proper if it is ultimately decided by the court that Smoczyneski is a properly qualified expert.

4 Before the *voir dire* began Mr. Strype, having reviewed Smoczyneski's curriculum vitae (Exhibit 292), asked the court to qualify Smoczyneski as "an expert in accounting evidence and to be received by this court pursuant to Rule 53.03." While the defence accepted Smoczyneski was an expert in the field suggested by Mr. Strype, they did not concede he was qualified under Rule 53.03

5 When this court heard submissions on the issue of whether Smoczyneski was a Rule 53.03 compliant expert, I questioned Mr. Strype as to what areas he was seeking to qualify Smoczyneski. In that regard, I was advised by Mr. Strype he sought to have Smoczyneski qualified as an expert in Polish accounting practices, Polish tax law and an expert in the obligations of Polish ex-pats to pay taxes. This becomes of some importance in relation to the ruling I had made at the commencement of Smoczyneski's evidence, that he did not have the necessary expertise to testify about Polish tax laws and how ex-pats were dealt with in the Polish tax system. I made this ruling in part because I had been informed the Plaintiff would be calling other experts to testify about Polish tax law. I propose to deal with Mr. Strype's request to qualify Smoczyneski, as initially articulated when Smoczyneski was called as a witness and as set forth in paragraph 4 above.

6 Smoczyneski prepared three reports with three charts that purport to determine what Zuber earned in the years before and after a railway accident that he had the misfortune to be involved on November 23, 1999. The reports were prepared in 2007, 2011 and October 2015. The October 2015 report was prepared at a point in time when Zuber had completed his evidence in-chief, and was effectively in cross-examination - having been warned by the court he was not to discuss his evidence with anyone.

Position of the Plaintiff

7 Mr. Strype argues that the only relevant report the court needs to consider is Smoczyneski's last report of October 2015, which includes the chart prepared in October 2015. It is suggested the 2007 and 2011 reports were only preliminary in nature, and that the Plaintiff does not intend to rely on either of Smoczyneski's earlier reports.

8 Dealing with the *Mohan* criteria, it is argued for the Plaintiff that Smoczyneski's evidence is relevant as it relates to "the largest issue" in the lawsuit; that being Zuber's claim for past and future wage loss. In that regard, it is argued that the type of evidence proffered through Smoczyneski is the type of evidence typically received by the court in a personal injury trial.

9 Mr. Strype goes further in his factum to suggest that Smoczyneski performed a forensic accounting assessment of Zuber's income, and that he also "took an investigative role in this case." It is further argued that "the standard Smoczyneski applied was that all transactions had to have independent support outside of just the evidence of Zuber to be accepted."

10 Returning to the *Mohan* analysis, Mr. Strype argues that there is no exclusionary rule that applies to this case and that Smoczyneski is a properly qualified expert. As to the position asserted by the defence that Smoczyneski's evidence is not Rule 53.03 compliant, Mr. Strype responds that Smoczyneski could not recall if he received a letter of instructions when he undertook his assignment by Plaintiff's counsel, and by inference it is suggested he could not produce what he did not have. As for the defence concern that Smoczyneski did not keep notes of conversations he had with Zuber and Mr. Gambala, it is argued those conversations are reflected in his report.

11 As for the defence concern that Smoczyneski did not keep documents provided to him by Zuber, Mr. Strype argues that in most personal injury cases an expert will return documents to the instructing solicitor, and gives as an example the large volume of medical documents often sent to an expert for review. It is therefore argued that Smoczyneski was under no obligation to keep the documents Zuber gave him for review.

12 As for the concern raised by the court about Smoczyneski meeting with and discussing his October 2015 report with Zuber when he was effectively in cross-examination and under an admonition from the court not to speak with anyone about his evidence, Mr. Strype argues that nothing really came out of those meetings as Smoczyneski in fact reduces his figures in 2015 from his figures in 2011.

13 Moving to the cost/benefit analysis of whether Smoczyneski's evidence should be accepted as expert evidence, Mr. Strype responds to the defence argument that relevance, reliability and necessity should be measured against consumption of time prejudice and confusion, by noting that the time has already been expended hearing Smoczyneski's evidence in its entirety; that because this is a judge alone trial Smoczyneski's evidence brings all of the information the court will need to assess Zuber's income earning capacity into one place; and that there is no prejudice to the defence because the 2015 report actually reduces Zuber's income from the 2011 report.

Position of the Defence

14 The defence asserts that Smoczyneski's evidence should be excluded because his evidence does not meet the threshold of necessity defined in *Mohan.* It is also argued that even though Smoczyneski may be a qualified accountant, he did not use his expertise in the preparation of his reports and is therefore not a properly qualified expert within the meaning of *Mohan.* It is also argued that his reports are not Rule 53.03 compliant and that his testimony goes to the ultimate issue the court has to decide.

15 As for the question of whether Smoczyneski's evidence is necessary, the defence submits that Smoczyneski's evidence is not the work of an expert analysis but largely is a presentation of numbers based largely on hearsay evidence that he accepted at face value, as opposed to an assessment of Zuber's assertions based on objective evidence.

16 The defence points in its argument to the reliance placed by Smoczyneski on Mr. Gambala's evidence as providing the necessary back up for Zuber's figures. It is argued that either Smoczyneski or Mr. Gambala is lying on this issue, because Smoczyneski says he met with and received confirmation from Mr. Gambala of many of the figures provided to him by Zuber. Mr. Gambala on the other hand, as noted by the defence, completely contradicted Smoczyneski's evidence in this regard.

17 While the Plaintiff argues that Smoczyneski's evidence will provide the court with an accurate basis upon which to determine Zuber's income earning capacity pre and post-accident, the defence notes in its argument that Smoczyneski did not even confirm the accuracy of his figures and pointed to the following cross-examination demonstrating that point: "Question: And your intention was that that represented an accurate review and an accurate opinion of what his income was correct? Answer: I don't think I used the word "accurate". I think I used the word like "possible".

18 In support of its assertion that Smoczyneski is not a properly qualified expert, the defence argues that Smoczyneski did not comply with the requirements of Rule 53.03 in the following regard: a) he failed to produce his instructing letter from Plaintiff's counsel; b) he qualified his opinion as being an "incomplete records job" and a "brown bag job" when these words, or even words that might bear a similar meaning, are nowhere to be found in his reports; c) he had conversations with Zuber and Mr. Gambala that are not documented in his report, nor are they documented in any notes; d) he failed to list all of the documents that he reviewed, and more importantly failed to keep the foundation reports by returning them to Zuber.

19 In essence, it is the position of the defence that Smoczyneski utterly failed in conducting what he purports to have done, i.e. an independent analysis of Zuber's income pre and post- accident, and that what he really did was accept what he was told by Zuber and, thus, performed nothing more than the function of a bookkeeper. The court, it is argued, is in just as good a position to do this analysis -- an analysis that will require an assessment of Zuber's credibility.

Analysis

20 Smoczyneski prepared three reports for Plaintiff's counsel, the first of which was prepared in 2007, with subsequent reports authored in 2011 and again in 2015. The report prepared in 2015 is dated October 31, 2015. Zuber testified in-chief over the course of 21 days, commencing on November 26, 2014 through and inclusive of June 12, 2015. His cross-examination commenced on November 19, 2015 and ran through November 27, 2015, over the course of seven days. Zuber's evidence in-chief was complete on June 12, 2015, and at the completion of his evidence in-chief I warned him that he was not to speak to anyone about his evidence.

21 The significance of the warning that I read to Zuber will become readily apparent in the context of Smoczyneski's report of October 31, 2015. The warning is also significant in the context that there was an order excluding witnesses, with the usual exception for the parties and for experts. Smoczyneski did not sit in for Zuber's evidence.

22 In Smoczyneski's cross-examination he was asked when he commenced working on the October 31, 2015 report, to which he indicated that his report had commenced approximately six weeks prior its completion, which given the report is dated October 31, 2015 would suggest that Smoczyneski commenced preparation sometime in mid-September 2015.

23 Smoczyneski testified that he spoke to Zuber three to four times in connection with the preparation of his 2015 report. Smoczyneski was asked how much time he spent with Zuber in connection with the 2015 report, to which he replied "it takes a long time to work with Mr. Zuber", from which I infer that Smoczyneski spent a considerable amount of time with Zuber in connection with the preparation of his 2015 report.

24 While it was open for Smoczyneski to be briefed by Plaintiff's counsel with respect to the evidence as it unfolded during the course of Zuber's evidence in-chief, as well as any exhibits that might have been filed with the court, in my view it was entirely improper for Zuber to meet with Smoczyneski as it was a clear violation of the warning that I had given to him that he was not to discuss his evidence with anyone.

25 If Smoczyneski felt it was necessary to meet with Zuber to obtain the information necessary for the preparation of his 2015 report, Zuber - through his counsel, should have requested an exemption that would have allowed for

such a meeting. Counsel for the defence could then have made submissions and the court could then have considered whether or not it was appropriate for Zuber to meet with Smoczyneski. No such request was made.

26 There is very little jurisprudence that deals with how the court should deal with a situation where there has been a violation of a witness exclusion order, or where a witness has spoken to other witnesses or individuals about his or her evidence when the witness is in cross-examination. Where there has been a breach of a witness exclusion order, the evidence is not automatically excluded. Rather, the trier of fact must determine what weight, if any, should be given to the evidence of the witness testifying where there has been a breach of an exclusion order. See *R. v. Dobberthien*, *[1975] 2 SCR 560* and *R. v. Smuk*, *1971 3 CCC (2d) 457*.

27 It is not my intention to exclude Smoczyneski's evidence on the basis of Zuber's clear violation of the witness exclusion order and my admonition to him not to discuss his evidence with anyone.

28 Even if I was to exclude the evidence of Smoczyneski in relation to the 2015 report, there still remains the evidence that he has provided to the court arising out of his 2007 and 2011 reports. In connection with those reports Smoczyneski testified that he did not conduct an audit, but rather undertook what he described as a "brown bag" assessment or, put differently, an "incomplete records job". He was endeavouring to establish without the benefit of filed income tax returns, original documents, banking records, financial statements and other typical accounting documents, what Zuber earned between 1992 and 1999 when he was a passenger on a VIA Rail train that derailed. As well, Smoczyneski was endeavouring to determine the income that Zuber earned after the accident, from which it could ultimately be determined what Zuber's past and future wage loss is arising out of the injuries suffered in the accident.

29 In relation to the incomplete records job undertaken by Smoczyneski, it is important to understand that he did not have access to Zuber's Polish income tax returns prior to 1999, as Zuber testified that these were no longer available given that documents are not required to be kept in Poland for any period greater than six years. A similar excuse was provided for the absence of other types of documentation that would lend credibility to Zuber's pre-imposed accident earnings. Mr. Smoczyneski was retained in 2007.

30 Smoczyneski testified that when he first met with Zuber in 2007, he asked him to provide as many documents as he could that would lend credibility to the income Zuber asserted he had earned prior and subsequent to the accident. Zuber also came with an Excel spreadsheet that set forth what he says he earned. Smoczyneski testified that after he compared the documentation provided to him some things were left out and further questions were asked of Zuber, the answers to which he took into consideration in coming to the conclusions reached in the 2007 report, together with the schedule attached.

31 What was particularly significant from Smoczyneski's evidence was the fact that he did not keep any notes of his discussions with Zuber, nor did he keep the Excel spreadsheet provided to him by Zuber that formed the basis for the schedule that Smoczyneski prepared, attached to the 2007 report.

32 Smoczyneski was provided with various contracts that Zuber provided to him, which provided some of the backup for the assertion made by Zuber that he had earned income arising out those contracts. The contracts apparently had so-called secrecy clauses which required Zuber to insist that the contracts be returned to him. Those documents are no longer available for scrutiny by this court.

33 Smoczyneski was cross-examined at length with respect to the figures contained in the 2007 report and schedule. He was taken to all of the documentation that he relied upon in connection with the figures contained in the 2007 report. Almost without exception, the 29 source documents that he relied upon did not disclose any actual amounts that were paid to Zuber. The inescapable conclusion that I come to with respect to the 2007 report, is that most of the information contained in the schedule, attached to the 2007 report, comes from Zuber.

34 Smoczyneski made clear in his evidence that the 2007 report was only a preliminary report, and that it was always his intention to prepare another report if and when additional information become available that would allow

for greater scrutiny with respect to the income allegedly earned by Zuber pre and post-accident. A fundamental difficulty with this aspect of Smoczyneski's evidence is, that anyone reading the 2007 report would not draw from that report anything other than it was a report to be relied upon by its reader. There is nothing in the 2007 report to suggest that it is a preliminary report and that further reports would follow in the future, nor did he keep any of the so-called source documents that he had available to him.

35 I have little to no confidence in the opinion evidence offered to the court by Smoczyneski as it relates to his review conducted in 2007. In essence, his evidence is little more than a regurgitation of what he was told by Zuber. While Smoczyneski might now suggest his 2007 report was preliminary in nature, anyone reading it in my view would be left with the impression it was a final report to be relied upon by the reader as providing so-called independent expert evidence of Zuber's income between 1992 and thereafter. The 2007 report is anything but independent.

36 In cross-examination Smoczyneski was asked whether his job, as he understood it, was to assess whether what Zuber says "hangs together, i.e. whether it intuitively makes sense". He replied, "Yes". In essence, much of Smoczyneski's evidence is nothing more than Zuber's evidence dressed up in the form of an accounting spreadsheet -- it is far from an independent review of the evidence aimed at providing the court with an objective assessment of Zuber's earnings pre and post-accident.

37 What is also particularly telling is the extent to which Smoczyneski relied on the evidence of Mr. Gambala. When Smoczyneski conducted his review of Zuber's earnings that lead to his 2011 report and his October 2015 report, he testified that he relied on information supplied by Mr. Gambala to confirm amounts provided to him by Zuber. In cross-examination, he agreed that he relied heavily on the corroboration of Mr. Gambala. Apart from the fact Zuber never testified that Mr. Gambala was with him on any of the occasions he was paid large sums of cash, Mr. Gambala's evidence does nothing to corroborate Zuber's evidence about the amounts he says he was paid.

38 Mr. Gambala was, and still remains Zuber's lawyer in Poland, who provided what can be best described as the equivalent of what a corporate solicitor would be doing for a client in Ontario. He assisted in the drafting of various contracts. In his evidence he was taken to various contracts (Exhibits 23, 24, 31, 35, 40, 62, 70, 162), and was questioned as to his knowledge of whether Zuber was paid for the work reflected in the contracts. In some cases his answer was he did not know (Exhibit 70), in other cases his answer was he assumed Zuber was paid, and in others he said he was told by Zuber he was paid. As for the Bastion Group of Companies, Mr. Gambala testified he never looked at the Bastion financial books and records as he was not interested in Bastion's accounting. This evidence is particularly relevant, as Mr. Gambala testified that the only discussions he had with Smoczyneski was with respect to the "incoming money for the Bastion companies".

39 Mr. Gambala's evidence does not support the evidence of Smoczyneski, that Mr. Gambala corroborated Zuber's information about his earnings. Mr. Gambala was Zuber's lawyer, not his accountant. It is not overly surprising that Mr. Gambala appears to have paid little attention to what Zuber received as payment for the various contracts he was shown. At most, to the extent Mr. Gambala provided so-called corroborative information that Smoczyneski says he relied upon, it was little more than double hearsay - the basis of which was Zuber himself, hardly objective corroborative evidence one might expect an accountant to rely upon.

40 Smoczyneski is tendered to the court as an expert retained to "confirm the earnings and certain expenditures of Mr. Zuber" (page one of his October 11, 2007 report). Attached to his 2007 report was a three-page spreadsheet marked as Exhibit 152B. In cross- examination he was asked if Exhibit 152B was a "replica" of the Excel spreadsheet that Zuber prepared. Smoczyneski responded that he received an electronic copy of Zuber's spreadsheet, which he "updated". He was also asked for the source of the figures reflected in Exhibit 152B. While his evidence in-chief and his report might lead one to believe that he relied on source documents to confirm amounts paid to Zuber, in point of fact when pressed in cross-examination he agreed that almost without exception the figures came from Zuber.

41 As someone tendered to the court with professed expertise, I was less than impressed with Smoczyneski's

preparation and basic lack of knowledge in certain areas of his evidence. There were lengthy pauses in his evidence that left me with the distinct impression Smoczyneski did not have a good hands-on knowledge of the facts he relied upon in his reports. It also became apparent during cross-examination that there was more than one version of the 2011 report dated April 20, 2011. When asked how this could happen, he testified "I have no idea". He further testified that he assumed there was only one report and did not know there was two versions, and that he was surprised a second version had been signed by a colleague When asked how many drafts of the 2011 report were done, he again said he did not know. When asked if received a letter of instruction from Plaintiff's counsel, he replied "that is a good question -- perhaps by email". Smoczyneski also confirmed that he reviewed the 2011 report and its schedule (Exhibit 152A) with Zuber; that there was a "progression" of three to four drafts and that changes were made based on Zuber's input. None of the drafts were kept to see the "progression" of the changes.

42 As a professional accountant trained in Great Britain, I find it inconceivable that Smoczyneski came to court with no notes; no working papers and none of the source documents he says he relied upon to prepare his various reports. He says he relied heavily on information from Mr. Gambala, yet he kept no notes of those conversations. Mr. Gambala's evidence, as I have already indicated, does not support Smoczyneski's assertion that Mr. Gambala corroborated many of the figures in his 2011 and 2015 reports.

43 Another aspect of Smoczyneski's evidence that raises doubt about his objectivity relates to the manner in which he treated the income Zuber says he received from SNET. The contract that Zuber had with SNET called for a monthly retainer fee (initially $3,500 per month and which was raised in subsequent years), plus a monthly expense amount of $1,000 (See Exhibit 40, para. 5.4.1 and para. 5.4.2). Zuber testified that despite the wording of the contract, the monthly expenses did not have to be justified with receipts. The thrust of Zuber's evidence was that he was actually paid $4,500 because he did not incur expenses. The monthly expenses of $1,000 were just a means for SNET to disguise what it was actually paying Zuber. While contractually this is not what the contract says, that nonetheless was Zuber's evidence.

44 Mr. Pittance was called as a witness on behalf of Zuber. He was the individual with whom Zuber had the closest contact while representing SNET. Mr. Pittance testified that contrary to Zuber's evidence, expenses would only be reimbursed and paid to Zuber if they were approved by SNET. Perhaps more importantly, Pittance testified the expenses were only reimbursed if they actually were incurred.

45 In his evidence, Smoczyneski testified that he dealt with the monthly expense figure from SNET as income to Zuber. He did this because of what he was told by Zuber. Even when confronted with the wording in the contract Smoczyneski stated, "the wording in the contract is not what happened". In the face of clear contractual wording that differentiates between a monthly retainer fee and expenses, for Smoczyneski to simply accept the word of Zuber without seeking evidence from another source, such as SNET, raises real concerns about Smoczyneski's objectivity.

46 Fortunately for trial judges, the Supreme Court of Canada has provided a straightforward framework within which the court must operate in determining whether an expert should be qualified to give expert opinion evidence. This framework involves a two-step process. The two-step process set forth in *R. v. Mohan*, *[1994] 2 S.C.R. 9*, can be summarized as follows:

1) The party seeking to qualify the expert must establish that the expert evidence meets four threshold requirements -- specifically:

a) relevance;

b) necessity in assisting the trier of fact;

c) absence of any exclusionary rule; and

d) proffered by a properly qualified expert.

2) If the four threshold requirements are met, the trial judge retains discretion to exclude the evidence if he or she concludes the evidence's prejudicial effect outweighs its probative value. This is often referred to as the trial judge's gatekeeper function.

47 The gatekeeper function is one that has been around for some time. It is not new. In *R. v. J.L.J.*, [2000] 2 S.C.R. 600, Binnie J stated:

> The court has emphasized that the trial judge should take seriously the role of gatekeeper. 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 can go at the end of the day to weight rather than admissibility...

48 What has been referred to as the path of least resistance by some judges is to simply admit the expert evidence and then attach little to no weight to the opinion. To adopt that path of least resistance is to abdicate the gatekeeper function. The proper role of the trial judge is to consider the evidence being proffered as expert evidence now, and not leave it to the end of the trial and decide the weight, if any, to be given to the evidence. I do not intend to take the path of least resistance.

49 Relevance is a threshold requirement for the admission of expert evidence and is to be decided by the trial judge as a question of law (*Mohan*, para. 18). In this case, it would be hard to argue that expert evidence concerning Zuber's past and future wage loss is anything but relevant.

50 Necessity refers to the ability of the expert to provide assistance to the court in the determination of a particular issue, because the court lacks the ability or the expertise to do so without the benefit of expert opinion evidence (*Mohan*, para. 23). In this case, the assistance of an accountant in determining Zuber's past and future wage loss could be an exercise in "number crunching", or it could be an objective analysis of Zuber's evidence to other corroborative sources of information. The court heard Zuber's evidence in terms of what he says he was paid from various sources over the relevant time periods. The court alone must determine the credibility of that evidence, as for the most part it is not backed up by any documentary evidence. Smoczyneski was not tendered to the court as a forensic accountant, although he does appear to have that experience in some of his past endeavors. Smoczyneski, by his own admission, did not conduct anything approaching a forensic audit of Zuber's income.

51 If Smoczyneski had done something more than essentially rely on Zuber's word for what he says he earned, his evidence may have been necessary to assist the court in its determination of Zuber's wage loss. Smoczyneski relied on what Zuber told him and on documents that were reviewed by him, many of which have not been produced in this trial. This court can only rely on the evidence at trial. Smoczyneski does not appear to have relied on that evidence and, as such, in my view his evidence is not necessary to assist me in my determination of Zuber's wage loss. As *Mohan* makes clear, it is not enough that the expert evidence may be helpful to the trier of fact. Such a standard sets the bar very low; rather the standard is one of necessity. In this case, while it may be difficult for the court to determine Zuber's earnings pre and post-accident, I am in just as good a position as Smoczyneski, if not better, having heard all the evidence to assess the credibility of Zuber's evidence and determine his earnings pre and post-accident.

52 As for the third and fourth threshold requirements for the admission of expert evidence, I am satisfied that there is no exclusionary rule that would preclude the opinion evidence in this case. In order to testify as an expert, the proposed expert must be shown to have acquired special or particular knowledge through study or experience (*Mohan*, para. 27). It is not disputed in this case that Smoczyneski meets this requirement, having qualified as an accountant in the United Kingdom and having practiced as an accountant for many years. The real question is whether he used his expertise as an accountant in proffering the opinions that he did. In my view he did not.

53 This, however, does not conclude the analysis the court is required to conduct in determining if Smoczyneski is a "properly qualified expert". In *White Burges Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R 182 at para. 53, Cromwell J. stated that "concerns related to an expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework".

Much has been written about an experts overriding obligation to the court to provide fair, objective and non-partisan assistance to the court. My review of Smoczyneski's evidence has led me to the ultimate conclusion that while he undoubtedly understood what his obligation to the court entailed; he utterly failed in establishing a basic threshold of objectivity. As such, I am not satisfied that Smoczyneski is a properly qualified expert.

54 In coming to the conclusions that I have, as it relates to the qualification of Smoczyneski as an expert, I fully recognize that Zuber may conclude I have "pulled the rug from underneath" his claim for past and future wage loss. That conclusion is, however, without merit. Zuber chose Smoczyneski as his expert. Zuber chose to provide documents to Smoczyneski that he was not allowed to keep and produce for scrutiny by this court. Zuber chose to speak with Smoczyneski when he was specifically admonished by me not to speak with anyone while the trial continued. In short, Zuber is very much now the author of his own misfortune. But perhaps more important is the fact I do not see Smoczyneski's evidence as being necessary. Zuber has testified and presented his case on his wage loss. I have to assess the credibility of that evidence and will still have to decide what his earning capacity was pre and post-accident. In short, Zuber's claim for past and future wage loss will be for me to decide, not Smoczyneski.

M.L. EDWARDS J.
