CITATION: McKitty v. Hayani, 2017 ONSC 6321
COURT FILE NO.: CV-17-4125
DATE: 20171023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TAQUISHA DESEREE MCKITTY, BY HER SUBSTITUTED DECISION MAKERS, STANLEY STEWART AND ALYSON SELENA MCKITTY, Applicant

AND:

DR. OMAR HAYANI AND WILLIAM OSLER HEALTH CENTRE, BRAMPTON CIVIL HOSPITAL, Respondent

BEFORE: Shaw J.

COUNSEL: Hugh Scher, counsel for the Applicant

Erica Baron, counsel for the Respondent

HEARD: October 18-20, 2017

EXPERT RULING

Overview

[1] The issue before me is with respect to the admissibility of Dr. Paul Byrne as an expert proffered by the applicant in this application.

[2] I gave my oral reasons on October 20, 2017 to be followed by written reasons.

[3] The applicant is seeking leave to have Dr. Byrne qualified as an expert in three areas as follows:

a. As an expert in general medical principles which includes such things as the operation of the hypothalamus and the neuroendocrine system, recommendations for the proposed treatment of Taquisha McKitty (Taquisha) and the meaning of bodily movement observed since she was declared dead according to the criteria set out in the *Canadian Medical Association Journal ("CMAJ Guideline")* for the neurological determination of death ("NDD");

b. As an expert in the determination of death;

c. As an expert to determine if Taquisha meets the legal standard of death and whether the criteria for the NDD supports such a determination.

[4] Taquisha was found unconscious and nonresponsive on September 14, 2017 and transported to the Brampton hospital by ambulance. She was admitted to the hospital suffering from a drug overdose. She required resuscitation. By September 18, 2017, she required a ventilator to support her breathing.

[5] On September 20, 2017, Taquisha was examined by Dr. Hayani, a critical care physician at the hospital. As Taquisha had not shown signs of spontaneous breathing for 36 hours, he suspected that she may have progressed to death by neurologic criteria. He and Dr. Patel, another critical care physician, applied the

tests as outlined in the *CMAJ Guidelines* to determine if Taquisha met the medical requirements for death by neurologic criteria.

[6] As both doctor found that Taquisha met all the criteria for NDD, she was declared dead. Dr. Hayani signed a death certificate on September 21, 2017 which indicated that she had died on September 20, 2017.

[7] The applicants commenced this application on September 21, 2017 and obtained an *ex parte* order that Taquisha was not be removed from the ventilator. The matter was then adjourned one week. On September 28, 2017, after hearing submissions, I granted a further adjournment to October 17, 2017.

The preliminary issue before the court on October 17, 2017, was a determination of Dr. Byrne's qualifications. In my oral reasons delivered on October 20, 2017 I found that Byrne could not be qualified as an expert witness. The following are my written reasons for that decision.

The Proposed Expert

[8] Dr. Byrne received his PhD in 1957 from St. Louis University School of Medicine. He was certified by the American Board of Pediatrics in 1963. In 1975 he was certified by the sub-board of Neonatal-Perinatal Medicine on the American Board of Pediatrics. His post-graduate degree in 1962 was in the Care of Premature at the University of Colorado. He received further post-graduate

training in 1963 in Neonatology at the American Academy of Pediatrics in Boston. He has had a number of academic appointments with the last being as clinical professor of pediatrics at the University of Taledo. He was Director of Neonatal intensive care units in Nebraska, Oklahoma and Ohio. His evidence was that he has been qualified in eight states as an expert on issues dealing with neonatology, brain death and nervous system dysfunction. I did not have copies of any of the cases in which he was qualified.

[9] Dr. Byrne's evidence was that he began to study the issue of brain death after becoming involved with the treatment of a baby who was on a ventilator and had flat brain waves consistent with cerebral death. Dr. Byrne's evidence was that he treated this baby and he recovered. In his Affidavit sworn October 11, 2017, Dr. Byrne discussed the case of Jahi McMath, a girl from California. In para. 47, he deposed that he visited her in the hospital. No other evidence was presented regarding his involvement with Jahi McMath. He deposed that she was in the same condition as Taquisha and that with the same treatment that he is recommending for Taquisha, Jahi McMath was "living".

[10] Dr. Byrne was co-author of a paper entitled "Brain Death – the Patient, the Physician and Society". In the conclusion section of the paper it states:

> All current legislation which establishes general criteria definitions of death based on the condition of the brain should be repealed

[11] Dr. Byrne has been president of the Life Guardian Foundation since 2009. His evidence was that this is an educational foundation to bring God's words to the hearts of people. He was involved with the writing of the Foundations' mission statement and adopted its contents. In that mission statement it states:

> Shamefully, "brain death" was invented for the soul purpose of obtaining healthy vital organs for profit from babies, children and adult human persons who are not truly dead. Life Guardian Foundation leadership and its members are opposed to any declaration of "brain death". Persons with head injuries need to have their life protected and preserved. No one should be declared dead until and unless there is separation of the soul from the body. When this separation occurs, what is left on earth is the remains, a corpse, an empty body.

[12] The mission statement also states:

> When physicians excise a vital organ from a "living donor" they are not only committing a crime against humanity, but also forcing the premature departure of the soul of the donor, against his will and the will of God.

The Law

[13] In determining whether an expert may testify, the court must consider the decisions of *R. v. Abbey* (2009) 97 0.R. (3d) 330, *White Burgess Langille Inman v. Abbott and Haliburton Co.* [2015] 2 S.C.R. 182 and *R. v. Mohan* [1994] 2 S.C.R. 9.

[14] *Mohan* established four criteria that the court must consider in determining whether or not to admit an expert report. Those criteria are as follows:

(a) Relevance

(b) Necessity in assessing the trier of fact

(c) The absence of any exclusionary rule, separate and apart from the opinion rule itself

(d) a properly qualified expert

[15] The onus is on the party seeking to introduce the expert to establish that the criteria of *Mohan* are met in order for the evidence to be admissible.

[16] In both *Abbey* and *White*, the court concluded that there are two steps in dealing with the admissibility inquiry. In the first step, the *Mohan* criteria are considered. The second stage requires a judge to balance the potential risks and benefits of admitting the evidence. Essentially, the court must determine whether its probative value is overborne by its prejudicial effect.

[17] At paras. 49 and 53 of *Abbey*, the court found:

> In short, if the proposed expert evidence does not meet the threshold requirements for admissibility, it is excluded. If it does meet the threshold requirements, the trial judge then has a gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied, then the expert evidence may be admitted. If the trial judge is not so satisfied the evidence will be excluded even though it has met the threshold requirement.
>
> Recent case law, including *White Burgess* itself, has emphasized the importance of the trial judge's gatekeeper rule. No longer should expert evidence be routinely admitted with only its weight to be determined by the trier of fact. As Cromwell J. stated in *White Burgess*, at para. 20, "The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role". Cromwell J.'s observation echos the point Binnie J. made in the earlier Supreme Court of Canada decision *R v. J.-L. J.* [2002] SCR 600, at para. 28: "The admissibility of the expert evidence should be

> scrutinized at the time it is proffered, not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[18] In considering the relevancy criteria, in *Abbey,* Doherty, J.A. divided relevance into two different concepts being logical relevance and legal relevance. In the first stage of the analysis, prior to the gatekeeping function, the court deals with logical relevance. At para. 82, Doherty, J.A. found that logical relevance meant "a requirement that the evidence have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact more or less likely than it would be without that existence." Legal relevance means that the evidence must be sufficiently probative to justify admission and that is assessed at the gatekeeper stage.

[19] As stated in *Mohan,* to be a properly qualified expert, the witness must be shown to have acquired special knowledge through study or experience with respect to matters on which he or she intends to testify. In *White Burgess*, the court found that the witness must be willing and able to provide evidence that is impartial, independent and unbiased.

[20] When the opinion being proffered is based on novel or contested science or science used for a novel purpose, that underlying science must be reliable for that purpose.

Analysis

Relevancy

[21] Dr. Byrne's evidence would be used to explain the functioning of various brain components such as the hypothalamus and pituitary gland and the production of various hormones. His evidence would also be used to recommend treatment for Taquisha. In that regard, it is logically relevant in that it may assist the court in understanding the functioning of the hypothalamus and its relationship with overall brain function.

Necessity

[22] Counsel for the respondent acknowledged that the test of necessity was not an issue. Given the complexity of the medical issues, the court requires the assistance of a properly qualified expert. The issue is whether or not Dr. Byrne is such a properly qualified expert.

Qualified Expert

[23] One of the issues before the court is whether the CMAJ Guidelines set out the proper criteria to make a determination of NDD. Dr. Byrne first read the CMAJ Guidelines after this action was commenced. He has never applied the CMAJ Guidelines or ever declared death according to the said guidelines. He therefore lacks the training and experience to provide opinion evidence on this issue. As noted in *Chen* v. *Ross*, 2012 BCSC 1605, mere review of literature by a proposed expert does not permit the expert to proffer an opinion on a subject

matter outside his field of expertise. In this instance, Dr. Byrne's only knowledge of the CMJA Guidelines is through his reading of them in the context of this litigation. Dr. Byrne is not qualified to give expert opinion evidence on the CMJA Guidelines or the application of those guidelines.

[24] With respect to treatment, I accept that Dr. Byrne has medical training and experience and he would be qualified to give evidence of general medical principles. That is not, however, the type of expert evidence that is necessary to assist the court.

[25] Dr. Byrne is not licensed to practice in Ontario, or anywhere in Canada. He has never trained in Canada. While he has observed Taquisha on two occasions for 30 minutes, he is not able to conduct any examination or assessment of her as he is not licensed to practice in Ontario. His opinion is based only on his observations of Taquisha and a review of her medical chart.

[26] Dr. Byrne's training and experience has been with premature babies. He has very limited, if any, experience in providing critical care treatment to adults. On cross-examination, his evidence was that he did not know if he was ever qualified by a court to give expert evidence on a case involving an adult. The CMJA Guidelines set out different criteria for children, adolescents, infants and newborns. Taquisha is 27 years of age. Dr. Byrne lacks training and experience to provide opinion evidence for adults both as it relates to critical care treatment

and the determination of NDD. Given the differences in the CMJA Guidelines as it relates to children, infants and adults, Dr. Byrne's lack of training and experience with adults takes on more significance in assessing his expertise.

[27] Dr. Byrne gave detailed evidence about the operation and interaction between the hypothalamus, which is a part of the brain, and the pituitary gland. His evidence was that Taquisha's hypothalamus was functioning but that treatment with high dosage of Levothyroxine was necessary to help heal Taquisha's brain. His evidence was that with treatment using various vitamins and adequate thyroid hormone, her brain might recover as currently she is in "global ishemic prenumbra" and has mistakenly been diagnosed with "brain death".

[28] In Dr. Byrne's affidavit, he described the case of a child in California by the name of Jahi McMath ("Jahi"). He deposed that Jahi was also diagnosed as being brain dead and that with the same treatment that he is recommending for Taquisha, she is now "alive". The only evidence of his involvement with Jahi is that he saw her once.

[29] He also gave evidence about being involved with a baby in 1975 who was also on a ventilator and had flat brain waves. His evidence was that he treated him and he recovered.

[30] Other than these two individuals, there is no other evidence that Dr. Byrne has any other experience in dealing with adults who have met the criteria for NDD. Furthermore, no evidence was before the court regarding scientific support for the treatments recommended by Dr. Byrne. I heard from Dr. Hayani and Dr. Healey that the treatment recommendations were not the standard of care for brain-injured patients and certainly not for someone found to meet the criteria for NDD. As the scientific support for this type of treatment is contested, the underlying support for the science must be reliable. In this matter, the court was not provided with any evidence to support the reliability of the science that the treatment recommendations proposed by Dr. Byrne could heal Taquisha's brain. Accordingly, he is not a qualified expert to give opinion evidence regarding treatment recommendations for Taquisha.

[31] Dr. Byrne's evidence was that he observed Taquisha's movement and that based on the nature, frequency and extent of those movements, they were not limited to spinal cord reflexes. The evidence from Dr. Healey, Dr. Hayani and Dr. Baker was that Taquisha's movements were consistent with spinal reflexes or automatisms. They do not agree that the movements are indicative of Taquisha responding to commands. Dr. Baker's evidence was that body movements after being declared brain dead can be very difficult for lay people and even for those involved in the healthcare field to understand.

[32] Dr. Byrne did not provide any scientific literature to support his assertion that the nature, frequency and extent of Taquisha's movements were not limited to spinal reflexes. There is a significant dispute regarding the nature of Taquisha's movements. There is no evidence before the court to assess the reliability of the science upon which Dr. Byrne relies to support his opinion that Taquisha's movement are more than spinal reflexes. Furthermore, there is no evidence that he has any training or experience with observing body movements after a person has been declared brain dead. He is not qualified to give expert opinion regarding Taquisha's movements.

[33] As expressed in my oral reasons, I find that Dr. Byrne is also not a qualified expert whose evidence would assist the court as he lacks independence and impartiality and he is biased.

[34] One of the issues before this court is the determination of brain death in Ontario and the criteria used to make that determination. When cross-examined, it was Dr. Byrne's evidence that he would never declare anyone dead provided their cardio-respiratory system was functioning, even if supported through a ventilator. His evidence was that even if there was no brain function, he would not declare anyone dead if they were supported by a ventilator. Furthermore, Dr. Byrne's evidence was that he has never declared anyone dead by brain death. How then can he give any unbiased evidence about the determination of brain

death, which is one of the issues in this case, as it is a concept that he does not accept?

[35] Dr. Byrne cannot be an independent and impartial witness to assist the court when he opposes the very concept of brain death. He has come to this court as an advocate for the position that brain death does not exist. His opinions are based on that biased view and would be of no assistance to the court.

[36] This lack of impartiality and bias was demonstrated in the media interviews he gave following the last court attendance on September 28, 2017 as described above. It is also demonstrated in the mission statement for the Life Guardian Foundation, of which he is a co-founder, as described above.

[37] I do not have to go beyond a review of the *Mohan* criteria to determine that leave is denied to the applicant's request that Dr. Byrne be qualified as an expert witness able to provide opinion evidence. Even if he did meet the *Mohan*

criteria, given my significant concerns regarding his bias and lack of impartiality, I would have exercised my role as a gatekeeper and found that he was not a qualified expert. The prejudicial impact from a witness with a demonstrated bias against the neurologic determination of death would greatly outweigh the limited probative value of his evidence.

Shaw J.

Date: October 23, 2017

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EXPERT RULING

Shaw J.

Released: October 23, 2017