SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

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FAX COVER SHEET

Date: February 14, 2012

TO:	FAX NO.:
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FROM: Laurie Pietras, Secretary to The Honourable Madam Justice D.A. Wilson

TOTAL PAGES (INCLUDING COVER PAGE): 13

MESSAGE:

Re: Hoang et al v. Vicentini
Court file no. CV-06-315832-0000

See attached Endorsement (re second motion for mistrial) released today.

CITATION: Hoang v. Vicentini, 2012 ONSC 1068
COURT FILE NO.: CV-06-315832-0000
DATE: 2012 02 14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Christopher Hoang and Danielle Hoang, both minors by their Litigation Guardian, San Trieu and San Tricu, personally, Plaintiffs

AND:

Adriano Vicentini, Ford Credit Canada Leasing Company and Can Hoang, Defendants

BEFORE: Madam Justice Darla A. Wilson

COUNSEL: *D. MacDonald, M. Bennett and R. Ben*, Counsel for the Plaintiffs

D. Zuber, Counsel for the Defendant, Adriano Vicentini

T. McCarthy, Counsel for the Defendant, Can Hoang

B. Mitchell, Counsel for the Defendant, Ford Credit Canada Leasing Company

HEARD: January 17, 2012

ENDORSEMENT

[1] This is the second motion for a mistrial in this action, brought by the Defendants following the opening address of the solicitor for the Plaintiffs. A brief history is necessary to put this motion in its proper context.

[2] This is a claim for damages brought by the infant Christopher Hoang ("Christopher") as a result of injuries sustained in a motor vehicle accident that occurred in August of 2004, when he was six years of age. It is alleged that his father, the Defendant Can Hoang ("Hoang"), instructed the infant, along with some other young children, to get out of the car, cross the street and meet him on the opposite side where they would purchase tickets to Centre Island to watch the dragon boat races. As Christopher was in the process of crossing the intersection, it is alleged that his hat blew off and he ran to retrieve it. As he was in the process of doing so, he was struck by the motor vehicle operated by the Defendant Adriano Vicentini ("Vicentini").

[3] Liability and damages are contested in this jury trial. The trial was set to commence January 9, 2012. Various motions were brought by the Plaintiffs after the selection of the jury, including a motion to amend the prayer for relief, for leave to call more than three expert witnesses and for leave to call experts whose reports were delivered late. I ruled on the various motions, delivering oral reasons.

[4] Of particular significance to the motion currently before me was my ruling on the motion for leave to call more than three experts. As part of that motion, the Plaintiffs sought leave to call the police mechanic, Sergio Grisolia ("Grisolia"), who examined the Vicentini vehicle after the collision and filled out a two page form, which is found at tab 12 of Exhibit A in this trial. That document, dated August 9, 2004, contains a list of examination results for the various parts of the vehicle, including brakes, steering and tires. There are five columns next to the various items and the examiner can tick off whether the part in question was satisfactory or unsatisfactory. Identified as unsatisfactory in the brakes section are the friction material and the mechanical components, specifically that the "front calipers sliders seized". The balance of the brake items are noted as satisfactory. None of the boxes indicating whether the defect existed prior to collision are marked.

[5] In my ruling delivered January 11, 2012, I stated as follows:

> The Rules have very specific provisions for the inclusion of expert testimony at trials, and the 2010 amendments to the provisions governing expert reports with the Court, in my view, provide for more stringent requirements before an expert is permitted to testify. No report from Grisolia that complies with Rule 53.03 has been tendered, and there is nothing in the form that he completed in 2004 that sets out his opinion. I have no information as to what qualifications Grisolia has, apart from the fact that he was employed by the police to do mechanical inspections of vehicles. I don't know if he has the proper qualifications that would even permit him to be qualified as an expert at trial. In my view, on the basis of the document he completed on his inspection of the vehicle, I am not prepared to permit him to give expert testimony. The fact that the solicitor for the Plaintiffs has provided a synopsis of his expected testimony does not, in my mind, get around the problems with him offering an expert opinion to this Court. Counsel has retained an expert engineer who will testify on the liability issues...

[6] While I have not heard any evidence in this case, I have been provided with the expert reports of the engineers and the human factors experts. It is conceded that nowhere in the expert reports on liability is it suggested that the operation of the brakes on the Vicentini vehicle caused or contributed to the accident. Rather, Mr. Hrycay, the engineer retained by the Plaintiffs, concludes that Vicentini "ought to have been at a heightened level of awareness due to the traffic and obstacles within the intersection and he should actually have been poised and able to react to any hazard that presented within .75 seconds", "there was some delay between when Mr. Vicentini could have started his perception-reaction and when he actually did" and "had Mr. Vicentini applied his brakes at the maximum rate when the emergency first began with the appearance of the hat, he would have been able to bring his vehicle to a complete stop prior to or at the start of the skid marks and would have thereby avoided striking Christopher." There is nothing in this report about the condition of the brakes or any role played by brakes in the occurrence of the accident. Similarly, the report of Giffin Koerth, the engineers retained by the defendant Vicentini, makes no mention of the brakes as a factor. The collision reconstruction report prepared by Detective Constable De Los Rios makes no reference to the brakes on the Vicentini vehicle, although he reviewed the inspection document prepared by Grisolia.

[7] Following the opening address made by Plaintiffs' counsel in the first trial, the defendants moved for a mistrial. In oral reasons delivered January 12, 2012, I granted the motion. In doing so, I commented on the impropriety of Mr. MacDonald's remarks to the jury on the condition of the brakes, stating,

> ...In my view, these comments concerning the brakes and the anticipated evidence of Mr. Grisolia were improper in an opening address, given that it is not anticipated that any of the experts or lay witnesses for that matter will testify that the brakes played any role in the collision. Furthermore, I specifically ruled that the mechanic would not be entitled to express an expert opinion on the condition of the brakes or any role they may have played in the accident. To suggest to the jury that the mechanic would, as a layman, give evidence about the brakes and the friction material contravenes the intent of my ruling and was, in my opinion, inappropriate. These statements of counsel, in my mind, constitute argument and invite the jury to come to a conclusion on the role of the brakes that is not borne out in the evidence, and as such, are improper...

[8] The trial commenced again January 16, 2012 with the selection of a new jury. Mr. MacDonald commenced his opening remarks to the jury and after approximately 1.5 hours when I adjourned court for the day, counsel was not finished although he had completed his remarks on liability. At that point, Mr. Zuber rose and advised the Court that he intended on bringing a motion for a mistrial following completion of counsel's opening address.

Positions of the Parties

[9] Mr. Zuber submits that there are five reasons that a mistrial must be declared. First, Mr. MacDonald told the jury that drivers are required to keep their brakes in satisfactory condition and, if they fail to do so and someone is hurt, they are responsible. According to Mr. Zuber, this amounts to a submission to the jury that they can make a finding of negligence in the absence of any evidence to support it. It was submitted that Mr. Macdonald made numerous references to the calipers being seized and if they do not move, they cannot bring a wheel to a stop. Given that there is no evidence to support this contention, it was argued that in effect, it was a suggestion to the jury that the brakes did not work properly and played some role in the inability of Vicentini to avoid the collision. Mr. Zuber argued that the length of time devoted to the brake issue in Mr. MacDonald's opening remarks suggested to the jury they played a significant role in the accident.

[10] Mr. Zuber objected to the remarks made by Mr. Macdonald as to the adequacy of the police investigation. Mr. MacDonald told the jury that the police never secured any information from Vicentini which is inaccurate and, furthermore, that the jury would be in a better position than the police officers because they would have all of the information before them when they determined liability. It was submitted that this was completely improper in opening remarks.

[11] Mr. Zuber argued that counsel's submissions to the jury that they were bound with the duty to enforce rules to ensure that people are not injured on the roadways were inappropriate. This invited the jurors to assume the role of the enforcer of the community standards, which is clearly improper.

[12] Mr. Zuber submitted that Mr. MacDonald's opening address was full of argument which is clearly improper.

[13] On behalf of Ford Credit Canada Leasing Company ("Ford"), Mr. Mitchell noted that I had ruled the mechanic could not give opinion evidence on the brake function. By telling the jury that the right front brakes were very worn and unsatisfactory, it is submitted, was a clear breach of my ruling as the inspection document does not say that. Further, there is no nexus between the deficiencies noted on the report and the function of the brakes in the collision. Mr. Mitchell submits that by inviting the jury to draw the conclusion that the brakes played a role in the accident, in light of my rulings, brings the administration of justice into disrepute and places the defence in an extremely unfair position.

[14] Mr. McCarthy submitted that another mistrial must be declared. He agreed that the comment in the opening address of Mr. MacDonald contravened my rulings. By telling the jury that Grisolia had conducted 200 inspections of cars was suggesting that he was in the position of an expert. It was Mr. McCarthy's submission that there was no material difference between Mr. MacDonald's original opening address which resulted in the declaration of a mistrial and his more recent opening.

[15] In response, Mr. Bennett argued that Mr. MacDonald did not engage in argument in his opening but rather was an attempt to persuade the jury, which is permissible. He noted that the Plaintiffs in their Statement of Claim pleaded that the brakes were not in proper working order. Under section 193 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, it is up to Vicentini to prove that the unsatisfactory condition of the brakes as found by Grisolia did not cause or contribute to the accident. Cases were cited to support the argument that the inference can be drawn by the jury in the absence of expert evidence. It was argued this case is similar to *Snell v Farrell*[1] where the late Justice Sopinka commented on cases where the facts lie for the most part within the knowledge of the Defendant, very little evidence on the part of the Plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. Mr. Bennett denied that Mr. MacDonald told the jury that the brakes caused the accident; rather, he summarized the evidence and told them that they could draw the inference. It was submitted that the evidence from Grisolia is circumstantial and from that, the jury can draw the inference that the brakes played a role in the collision and that Vicentini was negligent if he fails to satisfy the onus on him to prove that he was not negligent.

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[1] [1990] 2 S.C.R. 311.

[16] Mr. Bennett denied that Mr. MacDonald told the jury that Vicentini failed to provide a statement to the investigating officer; rather, he said that there was no information from Vicentini given to the accident reconstruction officer, Mr. De Los Rios. At all times, Mr. MacDonald made it clear that the investigation was a civil one, not a criminal one.

[17] Mr. Bennett submitted that Mr. MacDonald did not try to inflame the jury by reference to common sense rules; rather, this was a "folksy" way of telling the jury what the standard of care is.

[18] Mr. Bennett denied that Mr. MacDonald ignored my rulings about the ambit of Grisolia's testimony and submitted that everything that Mr. MacDonald said could be supported on the evidence.

Analysis

[19] I do not intend to repeat my comments contained in my prior ruling on the motion for a mistrial, particularly those where I enunciated the purpose of an opening address. These reasons ought to be read in conjunction with my earlier ruling. Several objections are raised by defence counsel to the contents of Mr. MacDonald's opening remarks and it is submitted that because of the cumulative effect of the various transgressions, there must be a mistrial because the improprieties cannot be corrected through an instruction from me.

[20] It is a well-accepted principle that the purpose of an opening address is to provide the jury with an idea of what evidence will be called by a party during the trial, so that the jury will be able to better understand the evidence. Counsel must not state anything in an opening address that he or she cannot prove or does not intend to prove. *Phipson on Evidence, 13th edition*[2], p. 772.

[21] Argument has no place in an opening address; that is best left for the closing address. As Geoffrey Adair noted in his text, *On Trial*,

> There does not appear to be any definitive statement as to how far counsel may go in the opening address. A court, in controlling an opening, can only be guided by bearing in mind the appropriate purpose of the opening address and intervening when good advocacy descends into outright argument, which has no place in the opening address. Openings which present the case on the basis of passionate storytelling, thinly veiled opinions of counsel, or argument, whether

[2] John Huxley Buzzard et al., *Phipson on Evidence* (London: Sweet & Maxwell, 1982).

> obvious or in the form of excessive adjectives or rhetorical questions, must be curbed...."[3]

[22] The opening remarks must be read and considered in their entirety. I will deal with the various objections raised by defence counsel, Mr. Zuber.

The suggestion to the jury that they must approach their task as enforcers of the rules:

[23] Mr. MacDonald stated,

> We in society here in Canada and around the world, trust that drivers will pay attention to pedestrians. Especially children. Especially when they know children are present...As a society we all look out for children, and when we drive we look out for them carefully. If we did not look out for them many more children would be hurt or killed in situations which become dangerous for children who can't recognize dangerous as well or as quickly as we can.

Later on in his address, he said,

> We know that if that rule isn't followed many lives would be at stake when any vehicle travels on any roadway. It is critical to all of our society's members that this rule be followed so that we can all be protected and feel that our vehicles will stop on the roadway.

[24] In my view, these statements are objectionable as they suggest to the jurors that their task in this trial is to ensure rules in society are to be enforced by them. These statements do not approach the impropriety of the remarks made by counsel in *Hall v. Schmidt*[4] although they are of the same ilk. They are inappropriate as they imply to the jury that their role is to make determinations in order to deter negligent driving which leads to injury and death. That is not their task: it is to make findings of fact based on the evidence in this particular case. They are not the enforcers of the rules of the roadway, as suggested by Mr. MacDonald. This transgression, taken in isolation, however, is not fatal.

The comments made concerning the police investigation:

[25] Mr. MacDonald told the jury:

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[3] Geoffrey D.E. Adair, *On Trial: Advocacy Skills Law and Practice, 2nd ed* (Markham, ON: LexisNexis Canada Inc., 2004).

[4] (2001) 56 O.R. (3d) 257, [2001] O.J. No. 4274 (QL).

> Unfortunately, the police officer who did the report didn't have several important pieces of information. First of all, the police officer didn't get the chance to review any information at all from the driver, Mr. Vicentini. Because he did not have any information from the defendant, Mr. Vicentini, the police officer did not know Mr. Vicentini said he was watching the bus near his parking garage as he was about to—as the accident was about to happen. The police officer did not have that information. He did not place that information within his report. A second concern was that because the police officer did not have any information from the defendant, Mr. Vicentini, the police officer didn't know that Mr. Vicentini said he did not see the bright blue child's hat until it was right in front of him, even though it was there to be seen as it rolled through two full lanes, over 8 metres. So the police officer didn't get a chance to calculate Christopher's speed of movement as Christopher pursued his hat into the intersection. He did not make any of those calculations. Because he didn't make that calculation, the officer was not able to determine, as Mr. Hrycay and the defendants' own engineer both did, that Mr. Vicentini could have seen Christopher moving for 2.5 seconds before Mr. Vicentini struck him if Mr. Vicentini had been looking for Christopher. The police officer didn't get the chance to learn from Mr. Vicentini that he had his foot on the brake as he entered the intersection....Finally, you will be in a much better position than the police officer because you will have all of that information to help you make the decisions that you need to make...

[26] This passage is objectionable for several reasons. First, it is inaccurate. The liability brief marked as Exhibit A contains the police investigation file. There is a statement from the Defendant Vicentini that was given to the investigating officer at the scene of the accident. Constable De Los Rios, the police officer who completed the reconstruction report a few days later, in the list of documents he reviewed, does not make reference to reading the statement of the Defendant. However, he does not indicate why he did not review Vicentini's statement, nor does he say that there was no statement provided by Vicentini to the investigating officer. Therefore, to tell the jury that the police officer did not have any information from Vicentini was quite simply wrong and could leave the incorrect impression with the jury that he was not forthcoming with information or perhaps was not co-operative.

[27] Of greater concern was the suggestion to the jury that they would be in a superior position to the investigating officers when considering the facts of the accident. This is misleading and strikes me as an attempt to appeal to the jurors to decide the case on something other than the evidence. It is not rooted in fact; to the contrary, the police investigation appears to be thorough and nowhere is there any reference to needing further information from Vicentini which was not forthcoming or which hindered their ability to conduct a proper investigation.

[28] Finally, this type of suggestion to the jury is clearly argument and therefore inappropriate in opening remarks. Perhaps if the evidence bore out the allegation of an inadequate police investigation, this type of comment might be found to be acceptable in counsel's closing address, but certainly not in an opening address.

[29] This inappropriate suggestion to the jury was reinforced by counsel's comments earlier on in his address when he stated,

> Before coming to trial to meet you, we had to figure out a few things...The police investigated this accident and some of the findings made by the police are relevant in our case, however, in this matter we are dealing with civil laws and not criminal laws...

These comments taken together with the statements about the shortcomings of the police investigation suggest to the jury, in my view, that had they had all of the information from Vicentini, there might well have been some sort of charges, which is completely unsupported by the evidence contained in the police file. It is misleading at best and casts the Defendant Vicentini in an unfair light.

The references to the brakes:

[30] Finally, I turn to the issue of the reference to the condition of the brakes on the Vicentini vehicle. Mr. MacDonald told the jury:

> ...the second reason we're suing Mr. Vicentini has to do with the condition of the brakes. The safety rule is a driver is required to keep the brakes on his car in good working condition so that he does not needlessly endanger others. As a result of this accident, the police seized Mr. Vicentini's vehicle for inspection immediately after the collision. The police mechanic, Sergio Grisolia, conducted a thorough mechanical inspection of the car, including its brakes and tires. He has conducted more than 200 similar police inspections of vehicles. ...Mr. Grisolia found that the brakes were in an unsatisfactory state of repair. Mr. Grisolia found that the front brake pads' friction material was unsatisfactory, and Mr. Grisolia found the front brake—and this is on the right front brake—Mr. Grisolia found the front brake caliper sliders were seized so that instead of sliding they were stuck open. These mechanical parts were also deemed to be unsatisfactory....

[31] A great deal of time was spent by Mr. MacDonald describing the function of the various components of the brakes, including the sliders, the brake calipers, and the brake pads. Photos were shown to the jury of the rotor, new brake pads, the metal backing plate and the police photograph showing the skid marks left by Vicentini's car. Mr. MacDonald told the jury that there is a rule that drivers must keep the brakes on their car in good working order and if that rule is not followed, many lives would be in jeopardy.

[32] What Mr. MacDonald has done in his opening remarks is to invite the jury to find that the condition of Vicentini's brakes played a role in the occurrence of the accident. There is no evidence to support this contention and as such, it is highly improper. The circumstances of the accident giving rise to this claim have been investigated by numerous experts, including engineers and human factors experts retained by the plaintiffs and the defence. Nowhere in any

of the reports, including the police investigation and police reconstruction report, is there any suggestion that the brakes on the Vicentini car had any effect on the occurrence of the accident.

[33] The Plaintiffs' own engineer, Mr. Hrycay, is of the opinion that the Defendant Vicentini was not paying proper attention and should have been alert to the existence of children in the intersection. Had he been an attentive driver, he would have observed the hat and Christopher sooner than he did and would have taken evasive action to avoid striking the boy. Certainly, during the course of preparing his report, if Mr. Hrycay was of the view that the brakes on the Vicentini car were somehow responsible for his inability to stop in a timely fashion, he could have expressed that opinion. He did not.

[34] As I have previously indicated, there is nothing in the police file that points to the condition of the brakes on the Vicentini vehicle as being in any way responsible for the accident. The police reconstructionist who reviewed the mechanical inspection prepared by Grisolia has this to say about the Vicentini car,

> The vehicle was found in satisfactory mechanical condition. Notwithstanding the satisfactory mechanical status, one item was identified as unsatisfactory, namely, front caliper slider seized. Even though the above mentioned component was seized the vehicle was able to brake as was evident at the collision scene by way of two distinct parallel tire marks. Further, the vehicle showed regular wear and tear.

Nowhere in the body of the report, including the technical analysis, conclusion or opinion, does the reconstruction officer offer the opinion that the condition of the brakes was of any significance.

[35] The only evidence concerning the condition of the brakes can come from the police mechanic Grisolia who noted on the paper he filled out that the front calipers sliders seized [unsatisfactory] and friction material [unsatisfactory]. He does not say the brakes themselves were unsatisfactory for the job they were to perform, nor does he describe the effect of the seized calipers or friction material.

[36] As I have indicated earlier in these reasons, I delivered an oral ruling in which I specifically stated in response to the solicitor for the Plaintiffs' requests to have Grisolia offer expert testimony at this trial that I was not prepared to allow him to do so. Grisolia can only testify about his findings, he will not be permitted to offer an expert opinion on the effect of his findings on the functioning of the brakes on the Vicentini vehicle. He will not be allowed to hypothesize to the jury on what the possible effects might be of the finding on the two items he identified as not meeting the Ministry standards.

[37] In his submissions, Mr. Bennett provided me with cases on the ambit of expert testimony, the same cases that I was provided with during argument on the Plaintiffs' motion for leave to call more than three expert witnesses. I have already dealt with the issue of Grisolia's evidence and I am not prepared to revisit this point.

[38] I agree that following my granting of the first defence motion for a mistrial, Mr. MacDonald removed some of the remarks from his opening address concerning the brakes, specifically the ones that I identified in my ruling. That does not, however, deal with the impropriety of suggesting the jury can come to a finding of fact on evidence that will not be heard at the trial.

[39] In his submissions on the second mistrial motion, Mr. Bennett argued that there was nothing improper in what Mr. MacDonald told the jury about the brakes and that he did not offend my ruling. It is the position of the Plaintiffs that because there is a reverse onus on Vicentini by virtue of section 193 of the *Highway Traffic Act*, it is up to Vicentini to disprove the causal link. In my view, this is a flawed argument that misses the point.

[40] Section 193 of the *Highway Traffic Act* states:

> Where loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner, driver, lessee or operator of the motor vehicle is upon the owner, driver, lessee or operator of the motor vehicle.

It is not disputed that the reverse onus applies to Vicentini. However, this is of no assistance to counsel with respect to putting the condition of the brakes on Vicentini's car in issue in the absence of evidence to support this contention.

[41] As a result of my ruling on the ambit of Grisolia's evidence, he will not be permitted to testify beyond the findings noted on the document he completed. He will not be able to say, as Mr. MacDonald suggested to the jury, that the brakes did not work properly on the Vicentini car. He will not be permitted to testify that the condition of Vicentini's brakes played any role in the collision. Indeed, since none of the boxes are ticked off indicating whether the defect existed prior to the collision, he cannot even say whether the two unsatisfactory items he noted were present before the accident happened. Neither of the engineers will offer the opinion that the condition of the brakes made any difference to Vicentini's ability to avoid the impact.

[42] For Mr. Bennett to argue that as a result of the reverse onus, it is up to Vicentini to disprove that the brakes caused the accident is incorrect in law. A Defendant who bears the reverse onus does not have to disprove every allegation contained in the Statement of Claim. In this case, Vicentini must prove that the injuries suffered by Christopher did not arise through his negligence or improper conduct. He does not, for example, have to prove that he was not impaired at the time of the collision because there is no evidence of this. Similarly, he does not have to prove that the condition of his brakes prevented him from stopping his vehicle sooner and thereby avoiding the collision as there is no evidence of this. A Defendant who bears the reverse onus has to discharge the onus of the negligence alleged against him, based on the

evidence in the case and the case that is anticipated at trial; to suggest otherwise is to place an impossible burden on a Defendant.

[43] In one of the cases I was referred to by Plaintiffs' counsel, *Winnipeg Electric Co. v. Geel*[5] it is noted,

> ...by reason of that enactment the onus is now upon the defendant to show that it was not negligent, whereas normally in other cases it would be upon the plaintiff to show that the defendant was negligent. The result of that is that if the evidence is evenly balanced both ways the defendant has not shown that there was no negligence, and having failed in that, it could be held liable for negligence or a breach of duty, because the duty on the defendant is to free itself from the imputation of negligence. *In doing that, the defendant has not to carry it to any unreasonable extremes; it is just a mere preponderance in the balancing of the evidence....* [emphasis added].

[44] This case and others cited by Mr. Bennett discuss what is required on a Defendant to discharge the reverse onus under section 193. These cases all refer to the fact that to discharge this onus, the Defendant has to satisfy the Court on a *preponderance of evidence* that he was not negligent. There is no evidence in the case before me that the condition of the brakes on Vicentini's car caused the accident or had any effect on his ability to bring his vehicle to a timely stop, just as there is no evidence that he was impaired at the time of the accident. He does not have the onus of persuading the Court of these two facts, because to do so would, in my view, be an example of forcing a Defendant to carry a burden to "an unreasonable extreme" as referred to in the *Winnipeg Electric Company v. Geel* case, *supra*.

[45] Mr. Bennett, in his submissions, made reference to the purpose behind the enactment of s. 193, being that injured Plaintiffs might not have knowledge of all of the relevant facts and circumstances which lead to an accident and so to remove the inequity of this, the onus shifts to the Defendant. While I do not disagree with this assertion, it is irrelevant to my consideration of the propriety of Mr. MacDonald's opening remarks. In the case before me, I note that both sides have had ample opportunity to have all of the liability issues reviewed by experts who have provided their opinions. As I have indicated previously, none of the experts have placed the functioning of the brakes in issue in this lawsuit. I see no disparity between the positions of the parties in this case concerning the liability issue.

[46] Mr. Bennett also cited several cases dealing with causation and suggested that the Plaintiffs do not need to call expert opinion to enable the jury to draw the inference that there was a causal connection between the unsatisfactory items noted on the mechanical inspection and the functioning of the brakes at the time of the motor vehicle accident. I do not agree. The

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[5] [1931] S.C.R. 443.

cases referred to me by counsel for the Plaintiffs which discuss the issue of causation are distinguishable on their facts and of little assistance to the motion for a mistrial.

[47] *Snell v. Farrell, supra* and *Wilson Estate v Byrne*[6] dealt specifically with proving causation in a medical negligence action which is very different than the case before me. *Athey v. Leonati*[7] deals with causation concerning damages, not liability.

[48] Mr. Bennett submitted that it is sufficient for the Plaintiffs to lead circumstantial evidence about the brakes and that it is unnecessary for the Plaintiffs to have an expert opinion on this issue; the jury can draw the inference, it is submitted, that the brakes did not work properly and caused or contributed to the motor vehicle accident. I disagree. This is, in my opinion, a "smoke and mirrors" argument. In this case, both the Plaintiffs and the Defendants have had the opportunity to have their chosen experts thoroughly review liability. It was open to Mr. Hrycay, the plaintiffs' engineer, to opine that the two brake components identified as unsatisfactory by Grisolia contributed to the accident he did not. For Mr. Bennett to suggest that the jury can make the leap from Grisolia's notations on his inspection to finding the brakes did not work properly and caused or contributed to the accident is, in my view, unsupportable in law on the facts of this case.

[49] Looking at the opening remarks in their entirety, bearing in mind my ruling on the motion for leave to call Grisolia as an expert witness and my ruling on the motion for a mistrial, I am of the opinion that a mistrial must be declared. The remarks about the brakes were not just passing commentary; Mr. MacDonald spent a great deal of time on this issue with the jury and I do not believe that I can tell the jury through a strong corrective instruction to ignore these comments. To do so would, in my opinion, cast Mr. MacDonald in an unfavourable light with the jury and I am concerned that their view of him for the balance of the trial would be unfairly compromised. A mistrial must be declared.

D.A. Wilson J.

Date: 2012 02 14

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[6] [2004] O.J. No. 2360 (QL).

[7] [1996] 3 S.C.R. 458.

SUPERIOR COURT OF JUSTICE
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FAX COVER SHEET

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FROM: Laurie Pietras, Secretary to The Honourable Madam Justice D.A. Wilson

TOTAL PAGES (INCLUDING COVER PAGE): 8

MESSAGE:

Re: Hoang et al v. Vicentini
Court file no. CV-06-315832-0000

See attached Endorsement (re first motion for mistrial) released today.

CITATION: Hoang v. Vicentini, 2012 ONSC 1067
COURT FILE NO.: CV-06-315832-0000
DATE: 2012 02 14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Christopher Hoang and Danielle Hoang, both minors by their Litigation Guardian, San Trieu and San Trieu, personally, Plaintiffs

AND:

Adriano Vicentini, Ford Credit Canada Leasing Company and Can Hoang, Defendants

BEFORE: Madam Justice Darla A. Wilson

COUNSEL: *D. MacDonald, M. Bennett and R. Ben*, Counsel for the Plaintiffs

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T. McCarthy, Counsel for the Defendant, Can Hoang

B. Mitchell, Counsel for the Defendant, Ford Credit Canada Leasing Company

HEARD: January 11, 2012

ENDORSEMENT

[1] When the solicitor for the Plaintiffs was partially through his opening address to the jury in this personal injury action, counsel for the Defendant Hoang moved for a mistrial. This motion was supported by counsel for the Defendant Vicentini and for the Defendant Ford Credit Canada Leasing Company ["Ford"].

[2] Liability is contested in this trial. Briefly, the claim arises out of an accident that occurred August 6, 2004 when the infant Plaintiff, Christopher Hoang, who was six years of age at the time, along with some other older children, was asked by his father, the defendant Hoang, to get out of the car and cross the street while Hoang went to park the car. As the infant was crossing the street, his hat blew off and he ran to retrieve it. At the same time, the vehicle being driven by the defendant Vicentini was travelling along Queen's Quay and struck the infant, resulting in personal injuries for which damages are claimed in this lawsuit.

[3] Mr. MacDonald commenced his opening address and had not completed his remarks on liability when I adjourned Court for the lunch break. It was at that time that Mr. McCarthy rose and advised the Court that he was moving for a mistrial.

[4] Briefly put, it is the position of the defence that for a variety of reasons, the opening address of Plaintiffs' counsel was inappropriate and the prejudice created cannot be corrected by an instruction to the jury. It was submitted that most of counsel's address consisted of argument,

which was inappropriate. One of the objections related to the numerous statements made to the jury that the **Defendants** [emphasis mine] bore the reverse onus under the law and, therefore, they had to prove that they did not do anything wrong. It was submitted by Mr. McCarthy, counsel for the Defendant Huang, who is also the father of the infant plaintiff, that his client does not bear the reverse onus under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 and, therefore, the multiple statements to the jury that "the Defendants" must prove that they were not negligent was inaccurate in law and left the wrong impression with the jury.

[5] Further, objection was taken to the reference made by Mr. MacDonald to an answer to a question posed at the examination for discovery in which Mr. Hoang admitted that his actions were not those of a reasonable parent. Mr. McCarthy submitted that it was improper for Mr. MacDonald to read that answer to the jury when he knew it was inadmissible at the trial and further, that by telling the jury "He told us", the jury would believe that somehow Mr. Hoang had made an admission that he was responsible for the accident involving his son. This question goes to the very issue that the jury must decide in this case. Furthermore, it was submitted that Mr. MacDonald's failure to read the numerous questions that preceded the question that was finally answered, particularly when Mr Hoang did not have the benefit of an interpreter, was unfair.

[6] Mr. Zuber agreed with the submissions made by Mr. McCarthy and took issue with Mr. MacDonald's comments about the effect of the brakes on the ability of the Vicentini car to come to a stop. Mr. Zuber submitted that the reference to the two components on the brakes that did not meet the minimum standards of the Ministry of Transportation and the suggestion that this caused the accident was improper as none of the experts will testify that the brakes played any role in the collision. Mr. Zuber noted that Mr. MacDonald made reference in his address to the evidence of Mr. Grisolia ("Grisolia"), the police mechanic who inspected the Vicentini car after the accident. Mr. MacDonald suggested that Grisolia would testify that the brakes played a role in the accident. This was improper, it was argued, in light of my ruling that Grisolia would not be permitted to offer opinion evidence to this Court.

[7] Mr. Mitchell argued that it was improper for Mr. MacDonald to offer the jury his opinion on the evidence and further, he should not have made reference to evidence that might be ruled inadmissible. Mr. Mitchell agreed that Mr. MacDonald told the jury that it was up to the Defendants to prove that they did nothing wrong and this is a gross misstatement of the law. He noted that there are three different Defendants in this lawsuit and to suggest that they all bore the reverse onus of proof at this trial was fundamentally wrong and cannot be corrected by an instruction from the Court. Finally, it was submitted that the bulk of Mr. MacDonald's address consisted of argument which is clearly not permitted in an opening address.

[8] In response, the solicitor for the Plaintiffs advised the Court that he does not agree that the reverse onus does not apply to all of the Defendants and, in any event, what counsel says to the jury concerning the law is subject to the instruction from the trial judge, who can clear up any erroneous statements of law that have been made. Mr. MacDonald takes the position that he is entitled in his opening address to refer to any evidence that will be called at the trial and by quoting from an answer given by Mr. Hoang at his examination for discovery, there was nothing offensive about this and it was unnecessary for him to put the answer in context. Mr. MacDonald submits that he only used one quotation from the discovery evidence of Mr. Hoang and there

were other similar responses which he could have made reference to. It is permissible for counsel to use an answer given by a party at his discovery as evidence at trial. The fact that the response elicited goes to the heart of the liability issue at trial does not mean it cannot be referred to during counsel's opening.

[9] On the issue of the reference to the brakes and the anticipated evidence of the mechanic, Grisolia, Mr. MacDonald was adamant that he did not suggest to the jury that the mechanic would be providing opinion evidence at trial, suggesting that the condition of the brakes caused the accident. He acknowledged that he told the jury that they could make findings of negligence based on their own common sense but submitted that this is entirely appropriate. In sum, it is the position of counsel for the Plaintiffs that there was nothing in his opening remarks that offended the rules or that could prejudice a fair trial.

Analysis

[10] Lawyers practising in Ontario have the benefit of a number of fine texts that are excellent resources for advocates. One such publication which is often used by lawyers and referred to by judges is "The Trial of an Action"[1]. In that text, it is noted that the purpose of an opening address is to give the trier of fact a "general notion" of what the evidence will be in the case. Others have described the function of an opening address as limited, with the prime purpose being to articulate the issues in the case and outline the facts that the party intends to adduce occupational therapy establish its case. All of the texts concur that any invitation to the jury to decide the case based on emotion or on anything other than the evidence called at the trial is inappropriate and inflammatory. As John Olah writes in his text, "The Art and Science of Advocacy"[2], "...you cannot argue your case in your opening remarks. Persuasion is achieved by arranging the evidence in a compelling manner and by the choice of language."

[11] In my opening remarks to the jury, I told them that counsel were going to make opening addresses to them which would be like a roadmap, to let them know each party's position and what to expect as the trial progressed. The purpose of an opening address is not to persuade the jury that they ought to find in that particular party's favour; that is one of the functions of the closing address, after all of the evidence has been heard.

[12] I find the quotation from former Chief Justice Burger in *United States v. Dinitz*[3] which is referred to in the decision of Justice Dan Ferguson in *Hall v. Schmidt*[4] to be instructive on the purpose and scope of an opening address:

> An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not

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[1] John Sopinka, *The Trial of an Action* (Toronto: Butterworths, 1998).
[2] John Olah, *The Art and Science of Advocacy* (Toronto: Carswell, 1990).
[3] (1975), 424 U.S. 600 at 612.
[4] (2001), 15 O.R (3d) 257 at para. 64.

> an occasion for argument. To make statement which will not or cannot be supported by proof is, if it relates to significant elements of the case, ...fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching its verdict..."

[13] In my opinion, there were several problems with the opening address of Plaintiffs' counsel, and these were identified by defence counsel in their submissions to me. First, there was the misstatement of the law by Mr. MacDonald. While it is true that the *Highway Traffic Act* imposes a reverse onus on a driver of a motor vehicle who strikes a pedestrian, in my view, that section does not necessarily apply to Mr. Hoang based on the allegations in this case. The case against Mr. Hoang is framed in negligence for his failure to properly supervise the infant, in dropping him off and telling him to cross the street without supervision and thereby placing him in a situation of danger. In his address, Mr. MacDonald told the jury,

> We are suing Mr. Hoang for two main reasons- if a driver lets his passengers out and needlessly endangers them and as a result, one is harmed, the driver is responsible...Second, Mr. Hoang violated the safety rule of a parent. In any possibly dangerous situation the parent of a 6 year old must choose the safest available course and if he does not and as a result the child is hurt, the parent is responsible...In addition, Mr. Hoang did not walk with his children as they crossed the road...

There is no evidence that the Hoang motor vehicle struck the infant or caused his injuries.

[14] While counsel for the Plaintiffs submitted to the Court that the accident arose out of the use or operation of the Hoang motor vehicle, that particular issue deals with coverage under an insurance policy and is not before me for determination. Whether or not the accident arose out of the use or operation of the Hoang motor vehicle is a question of law and is not one that the jury would be asked to answer in any event.

[15] During the course of his address, Mr. MacDonald, on numerous occasions, told the jury that the law is that when a pedestrian is injured and a car is involved, "it is not up to the pedestrian to prove the Defendants did something wrong; it is up to the Defendants to prove that they did not do anything wrong..." He went on to say it was up to the jury to determine whether the Defendants proved they were not negligent. He stated in his remarks,

> ...the crucial question is did the Defendants prove to you that they were not negligent?...you will use your common sense and good judgment to make conclusions to determine whether the defence have proved to you that they could not have done anything else to, as careful drivers, prevent this collision from happening..."

This is not an accurate statement of the law as it relates to the Defendant Hoang. On multiple occasions Mr. Macdonald advised the jury that the Defendants had to prove they did nothing

wrong to escape a finding of liability and by doing so, he erroneously told them that the reverse onus applies to all of the Defendants.

[16] Further, it is problematic that counsel continually lumped the three Defendants together, suggesting that the same considerations on the issue of liability were applicable to all of them, when this clearly is not the case. If the misstatement of the law were the only offensive portion of the opening address of counsel for the Plaintiffs, I am of the view that through a strong correcting statement to the jury on the law, this problem could be remedied and the trial proceed. However, there were more serious transgressions contained in the opening address that must be scrutinized.

[17] I turn now to the issue of the numerous references to the brakes on the car.

[18] Counsel for the Defendants objected to the specific references to the condition of the brakes on the Vicentini vehicle. Mr. Zuber argued that Mr. MacDonald went on at great length about the unsatisfactory condition of the brake pads and urged the jury to find that the brake pads were a cause of the accident, when there will be no expert opinion at trial to state that the brakes caused or contributed to the accident. Mr. MacDonald conceded that his engineer will not comment on the brakes but he argued that there was nothing improper in his reference to the brakes being less than optimal because the jurors are the finders of the facts and it is open to them to find that the brakes on Vicentini's car were one of the causes of the collision.

[19] I agree that a considerable amount of time was devoted to describing the braking system to the jury. They were shown what the brakes looked like and how the brake pads worked. Mr. Macdonald showed photographs depicting the brake pads and a sample braking mechanism which was passed around among the jurors. He told the jury that the evidence of Grisolia would be that the brake pads were unsatisfactory and did not meet the minimum standards of the Ministry of Transportation. He advised the jury that Grisolia will testify "that there was very little friction material on the right front brake. That's what he thought, and basically he makes a layperson's observation that the friction material is almost non-existent..." Mr. MacDonald went on to tell the jury that while the brakes on three of the wheels of the Vicentini car worked properly, the brakes would have worked better had the fourth wheel had satisfactory material on the pads. He stated as follows, "The other component is for you to determine whether the brakes, in their unsatisfactory state, did anything that caused the vehicle not to stop as quickly as it would have stopped if it had satisfactory braking material." Finally, and to my mind, the most offensive reference to the brake issue occurred when Mr. Macdonald stated,

> Will the Defendants prove to you that they were not negligent and that is a photograph taken by police of the skids of the Vicentini vehicle after the vehicle was seized. So what you're seeing in this picture is the brake on the left and the brake on the right. I can give you a close up to look at those paths. Look at those paths and use your best judgment to determine that the Defendant can prove that the brakes did not cause this accident or contribute to this accident...

[20] In my view, these comments concerning the brakes and the anticipated evidence of Grisolia were improper in the opening address given that it is not anticipated that any of the experts or lay witnesses for that matter will testify that the brakes played any role in the collision.

Furthermore, I specifically ruled that the mechanic Grisolia would not be entitled to express an expert opinion on the condition of the brakes and the issue of causation. To then suggest to the jury that the mechanic would, as a "layman", give evidence about the brakes and their function contravenes my ruling and was inappropriate. These statements of counsel constitute argument and invite the jury to come to a conclusion on the role of the brakes that is not borne out in the evidence and as such, are unacceptable.

[21] Of paramount concern, however, in the opening remarks of Mr. MacDonald was the reference to the answer given by the Defendant Mr. Hoang to a question put to him at his first examination for discovery. I quote from the discovery transcript at questions 400 and 401:

> Question: Do you think it was prudent the way that you dropped Christopher off at the intersection?
>
> Answer: What do you mean prudent?
>
> Question: Do you think it was something that a reasonable parent should do?
>
> Answer: No.

[22] These questions and answers were blown up and displayed on a large screen during the course of Mr. Macdonald's opening address. Counsel told the jury that Mr. Hoang had admitted that his actions were not those of a reasonable parent during his discovery. I quote from the address: "Mr. Hoang himself admits to dropping Christopher off and admits that dropping Christopher off where he did was not something a reasonable parent should do..." While the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 provide that a party can read in discovery evidence of an adverse party as part of their case, that is subject to limitations Simply because questions were asked and answers given at an examination for discovery, does not necessarily constitute admissible evidence at the trial of an action.

[23] I agree with the submissions of defence counsel that the manner in which the solicitor for the Plaintiffs referred to the discovery evidence of Mr. Hoang made it appear that there was somehow an admission of liability made by that party, when in reality, the opposite is true: liability is hotly contested by Mr. Hoang in this case. It is misleading for counsel in an opening address to suggest to the jury that there has been an admission by a party when that is clearly not the case.

[24] It was inappropriate for counsel to make reference to the statement given by Mr. Hoang at his discovery for several reasons: first, it incorrectly suggests to the jury that somehow the issue of Mr. Hoang's negligence has been admitted; secondly, it is likely that the answer would be inadmissible at the trial of the action and the law is clear that counsel cannot refer to evidence that is inadmissible; thirdly, the answer given deals with a determination that must be made by the jury at the end of the case—that is, whether the actions of Mr. Hoang were those of a reasonably prudent parent or not; finally, the question that was emphasized to the jury was taken out of context. By this, I mean that the preceding questions attempted to secure from Mr. Hoang an affirmative answer to the question of whether he believed the accident was partly his fault. These questions were objected to as improper questions on the discovery. Mr. Bennett continued to ask the questions in the face of objections from counsel and, at one point, Mr. Hoang inquired

what the word "prudent" meant. Given that he did not have the benefit of a Vietnamese interpreter at the discovery and another discovery was later convened with an interpreter, in my view, it was unfair for counsel to take these two questions and responses, display them up on a large screen for the jury to view during the address and suggest to the jury that the defendant Hoang had somehow admitted that he had been negligent.

[25] If the question that was shown to the jury was on a minor point, perhaps this impropriety could be corrected by a further instruction from the Court. However, such emphasis was placed on the answer of Mr. Hoang and the suggestion made that this constituted an unequivocal admission that, in my opinion, it is so highly prejudicial that it cannot be corrected.

[26] When determining whether a mistrial ought to be declared as a result of an improper opening address, the Court must examine the address in its entirety. In my opinion, the opening address of the solicitor for the Plaintiffs contained a substantial amount of argument, as well as a fundamental misstatement of the law as it applies to the defendant Hoang. Portions of the opening address sounded more akin to a closing address and, in my view, this was an attempt to persuade the jury, which is improper.

[27] The many references to the role of the brakes in causing the accident in the absence of expert opinion to support this argument, and the urging of the jury to use their common sense to come to a determination of whether the Vincentini car braked as it should have in the circumstances, was improper. Of paramount concern, however, is the reference to the answer made by Mr. Hoang on his initial examination for discovery and the suggestion that there has been some sort of admission of negligence on his behalf in this lawsuit. I have considered at length whether I could remedy the prejudicial effects of these improprieties through a strong, corrective instruction. Regrettably, I have concluded that I cannot. The cumulative effects of these comments have had a serious prejudicial effect that compromises a fair trial. I would not want to leave a negative impression of counsel for the Plaintiffs with the jury at the outset of a long trial as a result of strong correcting instructions, as this could potentially affect the manner in which the jury views counsel and perhaps the Plaintiffs.

[28] A combination of these various infractions, in my view, makes it impossible to correct the prejudice that has been created in the minds of the jury and a mistrial must be declared.

D.A. Wilson J

Date: 2012 02 14

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FAX COVER SHEET

Date: February 14, 2012

TO:	FAX NO.:
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T. McCarthy	905 686 6447
B. Mitchell	519 253 6941

FROM: Laurie Pietras, Secretary to The Honourable Madam Justice D.A. Wilson

TOTAL PAGES (INCLUDING COVER PAGE): 7

MESSAGE:

Re: Hoang et al v. Vicentini
Court file no. CV-06-315832-0000

See attached Endorsement (re leave to call more than 3 expert witnesses) released today.

CITATION: Hoang v. Vicentini, 2012 ONSC 1066
COURT FILE NO.: CV-06-315832-0000
DATE: 2012 02 14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Christopher Hoang and Danielle Hoang, both minors by their Litigation Guardian, San Trieu and San Trieu, personally , Plaintiffs

AND:

Adriano Vicentini, Ford Credit Canada Leasing Company and Can Hoang, Defendants

BEFORE: Madam Justice Darla A. Wilson

COUNSEL: *D. MacDonald, M. Bennett and R. Ben*, Counsel for the Plaintiffs

D. Zuber, Counsel for the Defendant, Adriano Vicentini

T. McCarthy, Counsel for the Defendant, Can Hoang

B. Mitchell, Counsel for the Defendant, Ford Credit Canada Leasing Company

HEARD: 10 January 2012

ENDORSEMENT

[1] After the selection of the jury for this four to five week trial, I was asked to deal with various motions. The Plaintiffs served several motions on December 30, 2011, in advance of the scheduled trial date of January 9, 2012. By way of background, this is a claim for personal injuries sustained by the infant Christopher Huang ("Christopher") stemming from a motor vehicle accident in which he was involved on August 6, 2004. Liability is in dispute as well as damages.

[2] The Plaintiffs bring a motion for leave to call more than three expert witnesses at the trial. I was advised that the Plaintiffs wish to call experts in three categories: (1) eight or nine "hired guns" or experts retained for the purposes of providing an expert opinion at trial; (2) six treating practitioners of the infant; and (3) two third party experts. It is asserted all of the experts are necessary for the proper presentation of the Plaintiffs' case and there is no overlap in their anticipated testimony.

[3] In the first category, counsel for the Plaintiffs wishes to call: James Hrycay, engineer; Jason Droll, human factors expert; Sergio Grisolia, police mechanic; Dr. Perry Cooper, neuroradiologist; Dr. Elaine McKinnon, neuropsychologist; Ann Bedard, occupational therapist who, along with Dr. Gillett, neurologist, did an assessment of the infant; Dimple Mukherjee, life care planner; Susan Fraser, occupational therapist; and Professor Jack Carr, economist.

[4] In the second category, the solicitor for the Plaintiffs seeks to call various treating practitioners: Patty Young, speech language pathologist; Natalie Zaraska and Susan Fraser, occupational therapists; Paul McCormack, rehabilitation support worker; Dr. VanDeursen treating psychologist; and Dr. Peter Rumney, treating pediatrician.

[5] In the last category, the solicitor for the Plaintiffs wishes to call Rhona Feldt-Stein, an occupational therapist who did assessments for the accidents benefits insurer in 2008 and 2010.

[6] It is submitted by the solicitor for the Plaintiffs that this is a complex medical case involving an infant and it is imperative that the jury be provided with all of the necessary medical evidence in order for them to understand the nature and extent of the infant's brain injury. Further, a significant component of the claims of the Plaintiffs is the claim for future care costs. The expert retained by the Plaintiffs to quantify this aspect of the damages, Dimple Mukherjee, considered and relied upon the various reports of the occupational therapists and therefore, in order for there to be a proper foundation for the expert opinion of Ms. Mukherjee, the opinions of the various treatment providers on which she relied must be in evidence before the Court.

[7] The defence takes the position that the number of experts the Plaintiffs wish to call at trial constitutes overkill. It is unnecessary, it is submitted, to have more than one expert in a particular area give opinion evidence. To permit the Plaintiffs to call several experts in one specialty in a jury case is unfair as it may suggest to the jury that the defence case is weaker because of the number of experts it calls.

Analysis

[8] Section 12 of the *Evidence Act,* R.S.O. 1990, c.E.23 provides for the calling of expert witnesses at trial:

> Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding.

[9] In *Burgess (Litigation guardian of) v. Wu*[1] Justice D. Ferguson articulated the various factors for the Court to consider when leave is sought under section 12:

(a) Whether the opposing party objects to leave being granted;

(b) The number of expert subjects in issue;

(c) The number of experts each side proposes to have opine on each subject;

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[1] Burgess (Litigation guardian of) v. Wu [2005] O.J. No. 929

(d) How many experts are customarily called in cases with similar issues;

(e) Whether the opposing party will be disadvantaged if leave is granted because the applying party will then have more experts that the opposing party;

(f) Whether it is necessary to call more than three experts in order to adduce evidence on the issues in dispute;

(g) How much duplication there is in the proposed opinions of different experts;

(h) Whether the time and cost involved in calling the additional experts is disproportionate to the amount at stake in the trial.

In my view, points (f) and (g) merit particular scrutiny in this case.

[10] I am mindful of the Plaintiffs' right to put their case forward as it sees fit but this is not without restriction. I agree with the comments of Justice D. Ferguson in *Gorman v. Powell*[2] where he noted,

> ...Longer trials caused by calling unnecessary experts use up scarce resources and deny early trials to other litigants. To ignore the policy underlying s. 12 is contrary to the modern philosophy of civil litigation which is set out in Rule 1.04:...to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[11] In the case before me, I note that both liability and damages are hotly contested. The Plaintiff is an infant who sustained a head injury in the accident and it is the sequelae arising from this injury that are in dispute. I have no difficulty in granting leave to the Plaintiffs to call more than three expert witnesses at this trial; the difficulty lies in determining how many more than three the Plaintiffs ought to be permitted to call. The provisions of the *Evidence Act* are restrictive, intended to limit the number of experts who testify at a trial. Simply because an expert has authored a report that complies with the requirements under the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 does not automatically entitle a party to call that individual to give expert opinion at trial. The evidence must be necessary and not repetitive of other testimony from other experts.

[12] In recent times, judges have been cautioned about their role as a gatekeeper at trials. Justice Stephen Goudge in his report "Inquiry into Pediatric Pathology in Ontario" [the "Goudge Report"][3] emphasized the need for trial judges to be vigilant when admitting expert testimony, to scrutinize the necessity and validity of a proposed expert's testimony before determining if it

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[2] Gorman v. Powell [2006] O.J. No. 4233

[3] The Honourable Stephen T. Goudge, Commissioner, "Inquiry Into Paediatric Forensic Pathology in Ontario", Ontario Ministry of the Attorney General: 2008

ought to be admitted. This is not a new concept as it has always been the function of the trial judge to determine the admissibility of evidence. The Supreme Court of Canada has said[4], "...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..."

[13] I agree with the comments of Justice Todd Ducharme in *Dulong v. Merrill Lynch Canada Inc.*[5] where he stated,

> There is no question that, in civil cases at least, the path of least resistance in matters such as these seems to be to admit the evidence and then compensate for any of its weaknesses by attaching less weight to the opinion. But such an approach is an abdication of the proper function of the trial judge...

[14] The evidence on liability from Mr. Ilrycay and Mr. Droll is clearly necessary and the defence did not object to these experts being permitted to testify. Similarly, Professor Carr, the economist, shall be allowed to give expert testimony. Counsel for the Plaintiff wishes to elicit opinion evidence from Mr. Grisolia, the police mechanic who filled out a vehicle mechanical examination in the course of his duties on August 9, 2004. The two page form that was completed identifies Mr. Grisolia's findings but does not set out any opinion. Mr. Grisolia noted on the form that the front calipers sliders seized [unsatisfactory] and the friction material [unsatisfactory]. He does not describe the effects of the two items he deemed unsatisfactory nor does he comment on the function of the brakes themselves. Counsel for the Plaintiffs concedes this point, but submits that in speaking with the officer in preparation for trial, he was advised of Mr. Grisolia's opinion on the brakes of the Vicentini car. After learning this, counsel sent a brief synopsis of the evidence of Mr. Grisolia, including his opinion on the function of the brakes. Counsel for the Plaintiffs argued that Mr. Grisolia has evidence that is relevant and material to the issues in this lawsuit and there is no other way to get that evidence before the Court other than to have him testify and state his opinion.

[15] I do not agree. The *Rules of Civil Procedure* have very specific provisions for the inclusion of expert testimony at trials and the 2010 amendments to the provisions governing expert reports provide for more stringent requirements before an expert is permitted to testify. No report from Mr. Grisolia that complies with Rule 53.03 has been tendered and there is no evidence before me of any attempts made by the solicitor for the Plaintiffs to secure an opinion from Mr. Grisolia on the brakes on the Viscentini car in a form of a report that complies with Rule 53. There is nothing in the document that he completed in 2004 that sets out his opinion. What he has done is to examine the various items listed on the document and tick off the appropriate box to indicate whether the component met the Ministry standards or not. I do not say this in a critical fashion; this is the document that Mr. Grisolia is required to fill out by the

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[4] R. v. J.-L.J. [2000] 2 S.C.R. 600

[5] *Dulong v. Merrill Lynch Canada Inc.*[5] (2006), 80 O.R. (3d) 378 (Ont.Sup. Ct.)

police when he inspects a vehicle that has been involved in a collision. The document, however, is deficient in terms of providing the minimum information that is contemplated by Rule 53 for expert reports. I have no information as to what qualifications Mr. Grisolia has, apart from the fact that he was employed by the police to do mechanical inspections of vehicles. I do not know if he has the proper qualifications to even permit him to be qualified as an expert at trial.

[16] In my view, on the basis of the document he completed on his inspection of the vehicle, I am not prepared to permit him to give expert testimony at this trial. To do so, in my opinion, would contravene the requirements of Rule 53 and would flout the reasoning giving rise to the amendments to the *Rules* governing expert evidence. The fact that the solicitor for the Plaintiff has provided a synopsis of his expected testimony does not, in my mind, get around the problems with Mr. Grisolia offering an expert opinion to this Court. Furthermore, no unfairness to the Plaintiffs will result as a consequence of my ruling. Counsel has retained an engineer who has delivered a report that complies with Rule 53 and he, presumably, will testify on the liability issues. On the other hand, to permit Mr. Grisolia to testify at this trial and to provide his opinion on the function of the brakes on the Viscentini vehicle at the time of the collision would be manifestly unfair to the defendants Viscentini and Ford Credit when the performance of the brakes has not been an issue in this lawsuit and no expert has opined on this to date.

[17] I turn now to the medical/rehabilitation witnesses. Dr. Cooper is a neuro-radiologist, which is a different type of specialty than a neurologist. He will testify about the various imaging studies that he reviewed and their significance. The neuro-psychologist, Dr. McKinnon, possesses a different expertise than the treating psychologist Dr. VanDeursen. While there may be some overlap in the evidence of Dr. McKinnon and Dr. VanDeursen, that is something the Court can control. I would not expect that there would be much duplication in their evidence and to deprive the Plaintiffs of their ability to elicit evidence from these two different specialists would not be fair in the circumstances.

[18] Dr. Rumney is a paediatrician who has a specialty in the area of head injuries involving children. Patty Young is a speech language pathologist. Dimple Mukherjee has delivered a report quantifying the future care costs. In my opinion, all of these proposed witnesses have a specific area of specialty and leave ought to be granted to the solicitor for the Plaintiffs to call these individuals if he chooses to do so.

[19] Counsel for the Plaintiff wishes to call Ann Bedard, an occupational therapist who, together with Dr. Jane Gillett, authored a report dated May 14, 2010. I am advised that Dr. Gillett has passed away. Counsel wishes to call Ms. Bedard to testify. A review of the report makes it clear that Ms. Bedard spoke with Christopher's school. The parents were interviewed, although it is not clear by whom. An examination and functional assessment was carried out, presumably by Dr. Gillett, although that is not certain.

[20] The report concludes with a summary and recommendations signed by both Dr. Gillett and Ms. Bedard. Counsel for the Plaintiffs has indicated he intends to call Dr. Dawne MacGregor, a pediatric neurologist who assessed the infant on behalf of the Defendant Viscentini and delivered an expert report. He intends to call other occupational therapists to give evidence. In my view, particularly in light of the fact that Dr. Gillett has died and the problems

that creates in and of itself, I am not persuaded it is necessary to have Ms. Bedard testify and leave is not granted.

[21] The Plaintiffs propose to call Natalie Zaraska and Susan Fraser, both occupational therapists. Ms. Zaraska provided treatment commencing in 2005 and various reports, the most recent of which is December 2011. Ms. Fraser appears to have been retained in 2010 and provided reports dated April, July 2010 and December 2011. In my view, there is significant duplication in the proposed evidence of these two occupational therapists and it is not necessary that both be called to give testimony at the trial. One of the occupational therapists may be called in the discretion of counsel for the Plaintiffs.

[22] The solicitor for the Plaintiffs advises he wishes to call Paul McCormack, the owner/operator of Elements Support Services. According to his resume, this organization provides rehabilitation support workers to people recovering from an acquired brain injury. Various reports from 2010 and 2011 have been produced, signed by the rehabilitation support worker Mavis Lee and the clinical program manager James Gillam. None of the progress reports are authored by Mr. McCormack. The only document signed by Mr. McCormack is a letter dated December 8, 2011 to counsel in which he comments on the future care needs of Christopher. In doing so, he makes no reference to his own opinion, but rather states that "we" are concerned about future employability, and "we" have the impression he needs continuous supervision, etc. It does not appear Mr. McCormack was the hands-on worker providing treatment to the infant. It is unclear to me on what basis Mr. McCormack would be permitted to offer an expert opinion to the Court. The Plaintiffs intend to call other experts to opine on the issue of attendant care, employability and future needs. If what is sought are the views expressed in the December 2011 letter, in my opinion, this would be duplication of other expert evidence and therefore unnecessary. The solicitor for the Plaintiff is free to call the workers Ms. Lee and Mr. Gillam to testify about their involvement, as fact witnesses.

[23] Finally, I turn to the final proposed witness, Rhona Feldt-Stein, the occupational therapist that assessed the attendant care needs of the infant at the request of the first party insurer in 2008 and again in 2010. She completed a Form 1, indentifying the various levels of attendant care required. Quite apart from the issue of the fact that Ms. Feldt-Stein was retained by a different party for a different purpose, namely to provide an opinion on the reasonableness and necessity of attendant care items under the accident benefits legislation, her expertise and what she provides an opinion on is no different than that of the other occupational therapists, Ms. Zeraska and Ms. Fraser. There is significant duplication between the proposed evidence and it is unnecessary for Ms. Feldt-Stein to be called in addition to the other occupational therapist, who I have dealt with earlier in these reasons.

D.A. Wilson J.

Date: 2012 02 14