

Date of Release: November 15, 1995

No. B910142  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN: )  
 )  
 LANCE RONALD GIBSON )  
 )  
 PLAINTIFF )  
 )  
**AND:** )  
 )  
 KARL RAYMOND RICKETT AND )  
 VAN HERRICK'S ENVIRONMENTAL )  
 PLANTING LTD. )  
 )  
 DEFENDANT )

**RULING**  
**OF THE HONOURABLE**  
**MR. JUSTICE COULTAS**

No. B910143  
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**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN: )  
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 RONALD ALBERT GIBSON and )  
 )  
 LANCE RONALD GIBSON )  
 )  
 PLAINTIFF )  
 )  
**AND:** )  
 )  
 GEOFF HALL )  
 )  
 DEFENDANT )

**RULING**  
 )  
**OF THE HONOURABLE**  
 )  
**MR. JUSTICE COULTAS**

L. McGee Counsel for the Plaintiff Lance Ronald Gibson  
(in both actions)

L. Guistra Counsel for the Defendant Van Herrick's  
Environmental Planting Ltd. and Third Party

P. G. Kent-Snowsell

Counsel for the Defendant Geoff Hall

1           The plaintiff Lance Ronald Gibson was involved in motor  
vehicle accidents occurring on the 5th and 19th days of April in  
1990. These actions have been brought seeking damages for various  
injuries allegedly suffered by him in each, the most serious being  
a thoracic nerve injury. Causation is the principal issue in  
Action B910142. The actions have been tried together.

2           The trials commenced on April 18th, 1995 and continued in  
May, taking up 9 days. On May 17th the trials were adjourned  
generally. By May 17th the plaintiff's case had closed and the  
defence was partly heard. The plaintiff called a number of medical  
experts in his case and Dr. Barbara Allan, a neurologist and a  
defence witness, had been cross-examined and excused.

3           After the adjournment counsel arranged with the Trial  
Division to have the trial continue on November 20th 1995 for the  
week.

4           On September 20th 1995, two additional Reports were  
delivered by solicitors for the corporate defendant and the  
Insurance Corporation of British Columbia (the "defendants" in this  
Ruling) to Ms. McGee, counsel for the plaintiff. The Reports are  
those of Dr. Lawrence Elson, a Californian who professes to be an

expert in human anatomy and other fields, and a further report of Dr. Barbara Allan prepared after she had reviewed transcripts of another proceeding involving the plaintiff Lance Gibson.

5           Ms. Guistra, now counsel for the defendants, characterizes the reports as expert reports. She concedes they are not reports responding to the opinion evidence of the plaintiff's expert witnesses.

6           With respect to the Report of Dr. Allan, it seems that Mr. Hulley, then counsel for the defendants, did not canvass an aspect of Lance Gibson's injuries with Dr. Allan prior to her earlier written reports and did not do so when she testified at Trial. With respect to Dr. Elson, it seems that his existence was unknown to the defendants prior to the commencement of trial. They learned of him after the trial adjourned, and believe he may have important evidence to give on the issue of causation as it relates to the thoracic nerve injury.

7           In her written submission, Ms. McGee details the events following her receipt of the two Reports on September 20th 1995. The next day she received a letter from Campney and Murphy, the defendant's solicitors, advising that the Reports had been served pursuant to Rule 40A of the *Rules of Court*. That day, she attempted to reach Mr. Hulley and was advised by Campney and Murphy

that the file had been transferred to new counsel and she would be notified of the name of that counsel, in due course. On October 5th, Ms. McGee received a letter of October 3rd, 1995, advising that Ms. Guistra would henceforth be acting for the defendants. Ms. McGee replied to that letter on October 5th saying she wished a pre-trial hearing before me to obtain a ruling with respect to the two Reports in question. That hearing occurred on October 30th. I called for written submissions.

8 Counsel for the defendants suggests that Ms. McGee failed to give prompt notice of her objection to the admissibility of the Reports - the notice required pursuant to Rule 40A (s.13). That is not so. Ms. McGee acted promptly and appropriately the day she received the Reports and has pursued the matter diligently, since.

9 The defendants submit that the Reports were delivered at least 60 days before the resumption of trial; they rely on Rule 40A (2) of the *Rules of Court* which reads:

A written statement setting out the opinion of an expert is admissible at trial, without proof of the expert's signature, if a copy of the statement is furnished to every party of record at least 60 days before the statement is tendered in evidence.

10 Ms. McGee opposes the introduction of the Reports, alleging prejudice. The prejudice, she says, is:

1) If the Reports are admitted, the plaintiff will need to recall three of his medical experts to counter the disputed Reports. At least one of those experts is unavailable during the week of November 20th.

2) The action was commenced nearly five years ago and the trial will be further prolonged and judgment delayed, to the plaintiff's prejudice if they are admitted.

3) The plaintiff will need to testify to rebut the conclusions contained in the two Reports.

### Conclusions

11 On a strict interpretation of Rule 40A (2) expert reports must be furnished 60 days before the evidence is tendered, and they have been. However, the rule does not contemplate the situation where a long adjournment occurs in the course of a trial. I conclude the Rule was intended to give parties the opportunity to prepare for a trial based on full disclosure of expert opinion by both sides. Without notice of all the defendants expert reports before the trial commences and before the plaintiff's case has closed, the plaintiff is left in a compromised position. Rule 40A is designed to prevent "trial by ambush".

12           Despite the Rule, I consider that it is open to me to exclude the Reports if the prejudice to justice in receiving them exceeds the prejudice in including them. That consideration was spoken of in *Hunter v. Ellenberger* (1988), 25 C.P.C. (2d) 14 (Ont. H.C.J.) (The Ontario Rules of Civil Procedure provide that a copy of an expert report in Ontario must be given ten days before trial: Rule 53.03).

13           In the *Hunter* case, an actuarial report was furnished five days before the commencement of trial. The court allowed the report into evidence, saying at page 16:

The later report was useful to me in assessing the plaintiff's damages. However, as the report was not filed in the time required by r. 53.03, defense counsel objected to it being received. I have heard that on occasion a Court has refused to permit evidence to be given where the expert's report was not served on the opposing party within time. This is clearly authorized by the wording of r. 53.03...

. . .

It may be that late delivery of a report may cause such prejudice to the opposing party that the evidence cannot be permitted lest injustice result. Such cases must be very rare indeed, particularly if the trial is without a jury and an adjournment can be granted without undue inconvenience.

In my view, it should be remembered that any time a Court excludes relevant evidence the Court's ability to reach a just verdict is compromised. Relevant evidence should not be excluded on technical grounds, such as lack of

timely delivery of a report, unless the Court is satisfied that the prejudice to justice involved in receiving the evidence exceeds the prejudice to justice involved in excluding it. In the instant case, I received the report but gave defence counsel 10 days within which to consult with his actuary and decide whether or not he wished the trial to resume and to hear the opposing experts...

14           In the case at bar, the defendants concede that the plaintiff will be prejudiced if the fresh evidence is admitted, but submit that the prejudice will be minimal if the court imposes conditions for their admission. I agree.

15           The doctors will be available for recall but not in the week of November 20th. Counsel for the plaintiff informed the court on May 17th that the plaintiff would be testifying in rebuttal, in any event. The prejudice to the plaintiff for being "kept out of the money" can be compensated by an order for periodic advances. The defendants agree to pay any further bills of medical witnesses to cover their return to trial, when received. The issue of costs incurred by the introduction of the new evidence will be addressed at the conclusion of the trial.

16           I order that the two Reports may be tendered into evidence when the trial resumes on November 20th, subject to cross-examination. There is a concern with respect to Dr. Elson's

expertise. I am told that he will be called for cross-examination and the issue of his expertise must await that event.

Dr. Allan must be available for further cross-examination if the plaintiff's counsel wishes her to be.

17                   These are the conditions for admitting the evidence:

1) Each month the trial is delayed the plaintiff will receive from the defendants, Van Herrick and the third party, \$2,000 monthly by way of an advance on his claim for non-pecuniary damages. The corporate defendant and third party are jointly liable to pay that sum.

2) The costs of recalling the plaintiff's experts is payable to the plaintiff in any event of the cause, within 30 days of his counsel receiving the experts' accounts.

3) All the defendants, including the defendant Hall, will conclude their cases during the week of November 20th, 1995.

4) The plaintiff's rebuttal evidence will be called and submissions of all counsel heard in the week of March

11th, 1996. I prefer oral, rather than written submissions, if the trial schedule permits it.

5) Costs occasioned by the two reports being received will be addressed in final submissions.

6) Counsel will advise the trial division of their estimate of time to complete the defence in the week of November 20th and for rebuttal and submissions in the week of March 11th, 1996.

"G.R.B. Coultas, J."

November 15, 1995  
Vancouver, B.C.