SCC File 40023

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

LESLIE J. O'CONNOR

Applicant

-and-

PETER ST. MARTHE

Respondent

-and-

KEVIN DOAN

Proposed Intervener

MOTION FOR LEAVE TO INTERVENE

FILED BY THE PROPOSED INTERVENER, KEVIN DOAN

PURSUANT TO RULE 55 OF THE *RULES OF THE SUPREME COURT OF CANADA*

Proposed Intervener:

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IN THE SUPREME COURT OF CANADA
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BETWEEN:

LESLIE J. O'CONNOR

Applicant

-and-

PETER ST. MARTHE

Respondent

-and-

KEVIN DOAN

Proposed Intervener

NOTICE OF MOTION FOR LEAVE TO INTERVENE

FILED BY THE PROPOSED INTERVENER

PURSUANT TO RULE 55 OF THE *RULES OF THE SUPREME COURT OF CANADA*

TAKE NOTICE that the proposed intervener, Kevin Doan, hereby applies to a Judge of the Court pursuant to Rule 55 of the *Rules of the Supreme Court of Canada* for an order granting the following to the applicant:

a) leave to intervene in the appeal;
b) leave to serve and file a factum not to exceed ten (10) pages in length;
c) leave to make oral submissions not exceeding five (5) minutes;
d) no costs for or against the applicant on the appeal; and
e) such further or other order as the Court may deem just.

And in the alternative:

a) leave to intervene in the application for leave to appeal;
b) leave to file a memorandum of argument not exceeding five (5) pages in length;
c) such further or other order as the Court may deem just.

AND FURTHER TAKE NOTICE that the affidavit of Kevin Doan will be referred to in support of this motion, together with such further or other material as counsel may advise and as this Court may permit;

AND FURTHER TAKE NOTICE that this motion shall be made on the following grounds, as set out more fully in the affidavit of Kevin Doan and in the accompanying memorandum of argument:

a) The applicant has a vital interest in the issues raised in this leave application;
b) The applicant has relevant submissions to make that will be useful to the court and different to those made by other parties;
c) Such further and other grounds as counsel may advise and as this Court may permit.

Dated at Vaughan, Ontario this 3rd day of February, 2022.

_____
Kevin Doan

Proposed Intervener:

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ORIGINAL TO: **The Registrar**

COPIES TO:

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the respondent may serve and file the response to the motion together with the response to the application for leave.

SCC File 40023

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

LESLIE J. O'CONNOR

Applicant

-and-

PETER ST. MARTHE

Respondent

-and-

KEVIN DOAN

Proposed Intervener

AFFIDAVIT OF KEVIN DOAN

I, Kevin Doan, of the City of Vaughan, in the Province of Ontario make oath and say as follows:

1. I am the proposed intervener.

2. I have personal knowledge of the facts deposed herein, except where those facts are stated to be known to me upon information and belief, and where so stated I verily believe such facts to be true.

3. I make this affidavit in support of an application for leave to intervene in this matter before the Court and for no other reason.

4. I am an Ontario lawyer since 1996. Throughout my career, I practice personal injury law primarily arising out of auto accidents, exclusively representing injured persons, first in a small firm, and since 2015 as a sole practitioner. My practice involves substantial work with experts at all stages of civil litigation in Ontario. I have been certified as a specialist in civil

litigation since 2008. Some of the decisions I secured for the persons I represented are leading verdicts and legal precedents in personal injury law in Ontario.

5. Since 2010, I have been particularly concerned about flawed expert evidence, after having accumulated extensive experience involving experts in litigation, including those I encountered in my conduct of a complex case for a catastrophically brain injured person which resulted in what appears to be the largest award in automobile statutory accident benefits law in Ontario.

6. In 2018, I anonymously submitted a proposed rule change to the Ontario Civil Rules Committee to exclude expert evidence on issues of mixed law and fact. It was deemed beyond the scope and function of the *Rules of Civil Procedure*.

7. I remain concerned because expert evidence of mixed law and fact entails significant adverse impact on access to justice and reliability of justice.

8. Such expert evidence increases the risks of wrongful civil verdicts that may amount to wrongful life sentences of excessive suffering and safety risks, as the following reported case well demonstrates.

9. Brittany Pucci was 22 years old on the date of her accident of June 16, 2013. Another vehicle improperly entered the intersection and destroyed her car. She was checked and released on the same day. She deteriorated in the months following the accident as to be unable to look after her basic needs without help. Her behaviour regressed to that of a young child. At the time of her trial, nearly six years after her accident, she continued to need significant guidance to function even at a minimal level. She needed care and support services at the maximum catastrophic levels (*Pucci v. The Wawanesa Mutual Insurance Company*, 2020 ONCA 265 (CanLII), paras. 4-9; 2019 ONSC 1706 (CanLII), paras. 83, 89, 109).

10. Brittany, however, could have been denied of the care and support she needed if her psychiatric condition was not directly caused by the accident. A wrongful verdict on legal causation in a case such as hers amounts to a wrongful life sentence of excessive suffering and safety risks, including risks of premature death. Such a life sentence was therefore hanging in the balance, on the evidence of a medical expert who opined on the test of legal causation without explanation that the accident was not responsible for her psychiatric condition. Such a legal opinion, while on appeal was found to be flawed, was admitted at her trial. Fortunately for Brittany, she was saved as the trial judge decided in her favour despite the admission of flawed expert evidence of mixed law and fact.

11. With regard to the issue of prejudice to the applicant if leave to intervene is denied, my prejudice is losing an opportunity to urge the Honourable Court to grant leave to appeal in order to review an issue which may significantly impact the costs of access to justice by my clients, the injured public, and other users of the justice system, as well as their risks of expert-induced miscarriages of justice.

SWORN remotely by Kevin Doan of the City of Vaughan, in the Province of Ontario,

before me at the Town of Stouffville, in the Province of Ontario, this 3rd day of February 2022,

in accordance with O. Reg. 341/20, Administering Oath or Declaration remotely.

A Commissioner of Oaths, Alexander Voudouris (LSO# 32496R)

Kevin Doan

PART I: OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Position

1. The proposed appeal seeks to review the scope of cross-examination on expert evidence. Therefore, a review of the proper scope of expert evidence is necessary because it should impact the scope of cross examination. Opinion evidence which is beyond the proper scope of expert evidence should not be admissible - whether in examination in-chief or in cross examination.

2. Over the past generation, while the rules on admissibility of expert opinion evidence have generally become more rigorous, there remains a foundational question which has not received direct guidance by this Honourable Court, namely, "Does the proper scope of expert evidence extend beyond the fact-finding process and a question of fact to include opinion on a question of mixed law and fact?"

3. Currently, jurisprudence on expert evidence makes little distinction between opinion evidence on issues of fact and issues of mixed law and fact. The admission process generally is to direct nearly all proposed expert evidence to the *Mohan*[1] – *White Burgess*[2] gate and see what will percolate through, regardless of whether it is opinion evidence from a former judge to advise a sitting judge on what law and interpretation to apply to the facts of the case, written "in a form that would easily translate into reasons for judgment".[3] It is as if proposed expert evidence of mixed law and fact is equally eligible to reach the gate as any expert evidence of fact. Consequently, much expert evidence of mixed law and fact has been routinely admitted below in different areas of law.

4. *R. v. Fisher*, [1961] S.C.R. 535 remains the most direct, if conclusory, guidance by this Court on the issue. In excluding opinion evidence of mixed law and fact, the full and unanimous Court were "all in substantial agreement" with the reasons of the majority of a five-judge panel of Ontario Court of Appeal that "[w]here the opinion tendered, involves what is a mixed question of law and fact, the opinion is not admissible."[4] Despite this direct statement, jurisprudence

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[1] *R. v. Mohan*, 1994 CanLII 80 (SCC).
[2] *White Burgess Langille Inman v. Abbot and Haliburton Co.*, 2015 SCC 23 (CanLII).
[3] *Walsh v. BDO Dunwoody LLP*, 2013, BCSC 1463 (CanLII), paras. 13-16, 64-65.
[4] *R. v. Fisher*, 1961 CanLII 38 (ONCA), paras. 52; affirmed [1961] S.C.R. 535, p. 538.

below continues to contradict *Fisher* to purportedly follow *Mohan* for the proposition that there is no longer a general rule barring opinion evidence on the "ultimate issue". *Mohan* did not directly cite *Fisher* nor directly discuss expert evidence of mixed law and fact. This Court has yet to address expert evidence on an issue *of mixed law and fact* since *Fisher* was decided over 60 years ago, or to reconcile *Mohan* with *Fisher* on the "ultimate issue".

5. It is the respectful positions of this applicant that opinion evidence of mixed law and fact is inherently beyond the fact-finding process and is therefore beyond the proper scope of expert evidence, whether in examination in-chief or in cross examination.

6. *Fisher* remains good law to exclude opinion evidence of mixed law and fact, while the *Mohan - White Burgess* framework may harmoniously govern only opinion evidence of fact. The current jurisprudence which admits opinion evidence of mixed law and fact should also be reviewed for its adverse impact on the Canadian constitutional order and the rule of law.

B. Proposed Intervener

7. The proposed intervener is an Ontario lawyer since 1996. Throughout his career, he practices personal injury law primarily arising out of auto accidents, exclusively representing injured persons, first in a small firm, and since 2015 as a sole practitioner. His practice involves substantial work with experts at all stages of civil litigation in Ontario. He has been certified as a specialist in civil litigation since 2008. Some of the decisions he secured for persons he represented are leading verdicts and legal precedents in personal injury law in Ontario.[5]

8. For many years, he has been particularly interested in the issue of flawed expert evidence, after having accumulated extensive experience involving experts in litigation, including those he encountered during his work which resulted in what appears to be the largest catastrophic injury award in automobile statutory accident benefits law in Ontario. In 2018, he anonymously submitted a proposed rule change to the Ontario Civil Rules Committee to exclude expert evidence on issues of mixed law and fact, but it was deemed beyond the scope and function of the *Rules of Civil Procedure*.[6]

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[5] Affidavit of Kevin Doan, sworn February 3, 2022, para. 4.
[6] *Ibid*., paras. 5, 6.

PART II: STATEMENT OF ISSUE

9. Should this applicant be granted leave to intervene to assist the Honourable Court in determining whether the application for leave to appeal raises an underlying issue of sufficient importance as to warrant a review?

PART III: STATEMENT OF ARGUMENT

10. An applicant seeking leave to intervene must establish that they have a special interest or particular expertise in the subject matter of the appeal, and that their submissions will be useful to the Court and different from those of the parties.[7]

A. Interest and Expertise

11. The applicant professionally represents parties in civil litigation where expert evidence is of fundamental importance. If expert evidence of mixed law and fact is banned as submitted, such clarity reduces extraneous expert evidence and thereby reduces the costs to access justice and the risks of wrongful civil verdicts for his clients, the injured public, and for every Canadian who may come into contact with the justice system.

12. The applicant's interest also arises as a result of being a member of the legal profession and an officer of the Court, and therefore of having an important shared duty to prevent miscarriages of justice and to respond to the current crisis in access to justice.

13. The applicant's expertise has been demonstrated by a substantial 25-year career in personal injury litigation with the past 14 years as a certified specialist in civil litigation. Some of the decisions he secured for persons he represented are leading verdicts and legal precedents in personal injury law in Ontario. Some of the proceedings he conducted involved extensive expert evidence including some complex proceedings which led to what appears to be the largest award in statutory accident benefits law in Ontario for a catastrophically brain injured person.

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[7] *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended, ss. 55 and 57(2); *R v Barton*, 2019 SCC 33 at para. 52; *Reference re Workers' Compensation Act 1983 (Nfld)*, [1989] 2 SCR 335 at 339; *R v Finta*, [1993] 1 SCR 1138 at 1142-1143.

B. Useful submissions from a different perspective

14. The applicant respectfully submits that his proposed submissions below are useful to the Court as they cover an important issue in the law on expert evidence that has not been comprehensively reviewed by this Court in over 60 years.

15. The proposed submissions cover important inconsistency in the jurisprudence, and its serious implications on the Canadian constitutional order and the rule of law.

16. The proposed submissions are distinct from those of the parties in the proceedings below and appear to be of a different perspective from their submissions before this Court.

PROPOSED SUBMISSIONS

(a) Inconsistency in the jurisprudence on the scope of expert evidence

17. The nature of a question of mixed law and fact has been explained earlier by this Court: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests."[8] "Questions of mixed fact and law involve applying a legal standard to a set of facts … On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts."[9]

18. In *Mohan*, the Court was addressing disputed opinion evidence on a question of fact, namely whether Dr. Mohan's disposition fit a certain character profile. The Court, in effect, summarized the development in the jurisprudence on expert evidence on questions of fact, when it stated, *obiter* in respect of evidence of mixed law and fact, that there is no longer a general rule barring opinion evidence on the "ultimate issue". The Court did not expressly cite *Fisher*, an earlier decision from this Court, and more importantly, did not engage in any discussion on evidence of mixed law and fact.

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[8] *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[9] *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII).

19. In *Fisher*, on the other hand, while dealing with evidence of certain capacity of an accused which was also a question of fact, this Court adopted the following explicit restriction against opinion of mixed law and fact from the Ontario Court of Appeal:[10]

> [52] Where the opinion tendered, involves what is a mixed question of law and fact, the opinion is not admissible. Thus, a medical man may not be allowed in terms to give his opinion that an accused was a criminal sexual psychopath, for inherent in that status is a difficult legal concept […].
>
> [53] […] The question of appellant's capacity, of course, was for the jury, as was the question of his actual intent. These are questions of fact and not questions of mixed law and fact. […]

20. Guidance from this Court appears much needed to address this apparent contradiction, if any, between *Fisher* and *Mohan*. The jurisprudence below purportedly applies *Mohan* as to effectively overrule *Fisher* and directs nearly all proposed expert evidence to the *Mohan-White Burgess* framework where much evidence of mixed law and fact is routinely admitted.

21. Following is a brief citation of a small sample of caselaw below which admitted expert evidence on issues of mixed law and fact:

Land use and planning law:

Canadian Rental Development Services Inc. v. Ottawa (City), 2021 CanLII 770 (ON LPAT), where expert evidence of "in the public interest" was admitted, see paras. 3, 4, 44;

Personal injury law:

Pucci v. The Wawanesa Mutual Insurance Company, 2020 ONCA 265 (CanLII), where expert evidence on legal causation was admitted at trial,[11] but rejected on appeal for being legal opinions, see paras. 70-71;

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[10] *R. v. Fisher*, 1961 CanLII 38 (ONCA), paras. 52-53.
[11] *Pucci v. Wawanesa Mutual Insurance Company*, 2019 ONSC 1706 (CanLII), paras. 74-74.

St. Marthe v. O'Connor, 2021 ONCA 790 (CanLII), where expert evidence on apparent legal causation ("as a direct result", and "reasonable and necessary") was admitted, see para. 3;

Bruff-Murphy v. Gunawardena, 2017 ONCA 502, where expert evidence on apparent legal causation ("as a result of", "in relation to") was admitted, see para. 17; and

Corporate and commercial law:

Peters v. SNC-Lavalin Group Inc., 2021 ONSC 5021, where expert evidence on "material change", an acknowledged issue of mixed law and fact, was admitted, see paras. 107, 153.

(b) Inconsistency with the constitutional order and the rule of law

22. It is respectfully submitted that the admission of expert evidence on issues of mixed law and fact undermines the Canadian constitutional order and the rule of law in serious ways.

23. The province of the jury is not usurped but enlarged, as its attributes are expanded. Ordinarily, the jury must take legal instructions and guidance only from the judge. But with such expert evidence, the jury has an enlarged opportunity or power to hear and consider legal opinions from the expert. Indeed, it is more than just legal opinions, but legal *decisions* by the expert on how the law is *applied* to the facts, dressed as mere opinion evidence of an independent and impartial expert.

24. The power of the expert is dramatically expanded. Their power *exceeds* the power of the judge in a trial in many ways, including (a) while the expert can, the judge can not tell the jury what outcome to select, or what the Court's opinion or decision would be if the Court were to decide the dispute; (b) while the expert is practically exempt from providing written legal analysis on the underlying questions of law for appellate review, the judge must provide proportional and sufficient reasons; and (c) on appellate review, the expert enjoys greater deference than the judge because firstly, the expert's *legal* opinion is paradoxically deemed an

issue of *fact*; and secondly, any legal analysis of underlying questions of law are further insulated behind a tolerated absence[12] of expert analysis.

25. The role of the *judiciary* is usurped. In our constitutional order, it is the primary role of the judiciary to interpret and apply the law to the cases brought before it: *British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49*, paras. 50, 59. Saved for specific and properly delegated statutory powers to inferior tribunals, the judiciary has exclusive power and responsibility to decide the cases before it.

26. There is no apparent constitutional or legislative authority for the judiciary to effectively institute, *de facto*, an inferior tribunal where experts are permitted to apply the law to the facts, and *decide* ultimate issues of mixed law and fact, *without* statutory enactment, although with a full right of appeal *de novo* to the judge at the trial.

27. The judiciary appears to risk "an abdication of judicial responsibility"[13] if they were to consider or rely on the expert's legal opinion or legal advice in discharging its constitutionally independent duty to decide the cases before the court.

28. The expert usurps the role of the legal profession and appears to engage in the unauthorized practice of law with immunity. The expert engages in the trade of legal opinions they happen to have without any accountability to any Law Society for the protection of the public. Even when experts have been caught at trial for flawed expert evidence, errors and omissions in their legal opinions, and certain other misconduct unbecoming of an expert, their disciplinary record of prior adverse judicial comments are scraped clean for their next performance before a fresh new jury.[14]

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[12] For example, see *Bruff-Murphy*, para. 47; *Pucci*, ONCA, para. 12.
[13] *Saadati v. Moorhead*, 2017 SCC 28 (CanLII), para. 22.
[14] *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 (CanLII), para. 32: prior adverse judicial comments are not a proper subject for cross-examination.

Conclusion

29. The applicant respectfully submits that his interest and expertise, and the usefulness of his proposed submissions from a different perspective warrant the Court's permission to intervene.

30. As acknowledged by this Court that ensuring access to justice is the greatest challenge to the rule of law in Canada today, it is further submitted that the Court's consideration of leave applications be guided by enhanced inclusivity to facilitate a review where an application appears to promise an enhancement to access to justice, or to reliability of justice as this application respectfully should appear to do.

PART IV: SUBMISSIONS CONCERNING COSTS

31. The applicant seeks no costs and asks that no costs be ordered against the applicant.

PART V: ORDER SOUGHT

32. In the event that the Court decides to grant leave to appeal based on the materials before the Court including this Motion Record, but without the need to further hear from this applicant, this applicant asks for an order granting the following to the applicant:

(a) leave to intervene in the appeal;

(b) leave to serve and file a factum not to exceed ten (10) pages in length;

(c) leave to make oral submissions not exceeding five (5) minutes;

(d) no costs for or against the applicant on the appeal; and

(e) such further or other order as the Court may deem just.

33 Otherwise, in the event that the current materials before the Court are not sufficient to grant leave to appeal, the applicant respectfully requests the Court for an order granting the following to the applicant:

(a) leave to intervene in the application for leave to appeal;

(b) leave to file a memorandum of argument not exceeding five (5) pages; and

(c) such further or other order as the Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February 2022

_____

Kevin Doan
Proposed Intervener/Applicant

PART VI: TABLE OF AUTHORITIES

Statutory Provisions

Rules of the Supreme Court of Canada, SOR/2002-156, ss 55 and 57(2)