

Phillips v. A.G. Canada et al.
April 5, 2001, BCSC 522

HALFYARD J:

[1] This is an action for damages for sexual assault. The plaintiff alleges that he was physically and sexually assaulted by a number of persons during the time period from 1960 to 1968, while he was a child and a student attending at the St. George's Indian Residential School near Lytton, BC. The trial has been adjourned from March 26, 2001, to June 4, 2001, and the present third parties will become defendants.

[2] On February 18, 2001, the plaintiff delivered two expert reports that are objected to by the other parties. The first report is that of Carol Reiter dated February 9, 2000. Ms. Reiter is a counsellor trained and experienced in counselling victims of physical and sexual assault, who has been treating the plaintiff since March 15, 1999.

[3] Led by counsel for the third party, The General Synod of the Anglican Church of Canada, the defendant and third parties submit that the expert report of Ms. Reiter is inadmissible, in whole or in part, on three grounds:

- (a) **Ms. Reiter expresses favourable opinions about the credibility of the plaintiff.**
- (b) **Ms. Reiter presents argument in the guise of expert opinion.**
- (c) Ms. Reiter fails to state "the facts and assumptions on which [her] opinion is based," which is a requirement of admissibility set by Rule 40A(5)(b).

[4] On the first ground of objection, Mr. Miller referred me to the first and last pages of Ms. Reiter's report, where she made the following statements:

- (a) **"I believe that Tom was victimized at St. George's Indian Residential School, in the ways outlined in the statement of claim, for approximately eight years (from the age of 5 or 6 to the age of 14)."**
- (b) **"For a variety of reasons, I believe Tom has been describing incidents he actually experienced, rather than something he has read or made up."**
- (c) **"In conclusion, it is my belief that Tom Phillips was subjected to repeated and ongoing experiences of physical, sexual and emotional abuse in the years that he attended St. George's Indian Residential School in Lytton."**

[5] Mr. Miller relies on the settled rule that a party cannot call evidence that amounts to bolstering his or her credibility, and cites in support the decision of Lowry J in *Spencer v. Soanes*, Vancouver Registry No. B901809, March 28, 1994.

[6] For the plaintiff, Mr. Dumonceaux submits that Ms. Reiter is not really expressing her opinion that Mr. Phillips is telling the truth, she is only saying that she believes that Mr. Phillips believes in the truth of what he told her. It is further argued that this is a legitimate opinion based on psychological testing.

[7] I do not think that the distinction contended for by plaintiff's counsel can be maintained, in the face of the forceful, direct statements made by Ms. Reiter in the passages of her report that I have mentioned. Moreover, even if Ms. Reiter's opinion could be condensed to: "I am not saying Mr. Phillips' allegations are true, I am only saying that he believes they are true," in my opinion,

that would make no difference. It would still amount to an opinion that Mr. Phillips is an honest person, who honestly believes in the truth of his allegations.

[8] Honesty is the first of the two elements that go to make up credibility. The other element is accuracy or reliability. In my view, Ms. Reiter has made comments on both the honesty and the reliability of the statements made by the plaintiff. The law is clear that the credibility of witnesses is not the proper subject of expert opinion. See *R v. Beland and Phillips* (1987) 36 CCC 3d 481 (SCC) at 486 and 489. The three passages in Ms. Reiter's report that I have set out above, contravene this rule, and must be edited out of the report.

[9] It should be mentioned that plaintiff's counsel expressly requested Ms. Reiter to provide her opinion as to whether the plaintiff had been victimized as he alleged, and to state the degree of certainty of her opinion in terms of the civil standard of proof. While the answers to these questions would be useful information for counsel, I think counsel was in error in asking Ms. Reiter to include these matters in her report.

[10] There have been cases where experts who have interviewed a person who complained of being sexually abused, have been allowed to give the opinion that the complainant has exhibited behaviour which is consistent with him or her having been sexually assaulted. For example, see: *R v. Burns* (1994) 89 CCC 3d 193 (SCC) at 200-203; *R v. J.(R.H.)* (1994) 86 CCC 3d 354 (BCCA) at 366-367. However, in my opinion, an expert is never permitted to express an opinion as to who committed the alleged sexual assault. By necessary implication, I think Ms. Reiter has done this.

[11] **In a number of reported cases, experts have been permitted to give the opinion that the apparently inconsistent conduct of the complainant was not necessarily inconsistent with his or her allegation of sexual abuse. Such evidence can provide an explanation for acts and omissions of a complainant which might otherwise seem to suggest that the allegation of sexual abuse is false.** See *R v. Jmieff* (1994) 94 CCC 3d 157 (BCCA) per McEachern CJBC.

[12] In my view, whenever an expert expresses the opinion that certain behaviour of a plaintiff was consistent with sexual abuse, or the opinion that other conduct of the plaintiff was not inconsistent with sexual abuse, such opinion evidence is relevant to and supports the credibility of the plaintiff. However, in a proper case, such opinion evidence is admissible, notwithstanding that it may indirectly contravene the rule against bolstering the credibility of a witness. See *R v. Burns*, at p. 202, and *R v. Jmieff*, at pp. 163-164. Admissibility will depend on the plaintiff's trial testimony and the grounds upon which his credibility may be challenged.

[13] It is my opinion that the law on these issues is the same in civil cases as in criminal cases.

[14] The second objection to Ms. Reiter's report is that it contains argument. Mr. Dumonceaux concedes there may be some statements that approach argument, but says any defects in this regard are minimal, which can be ignored as necessary by me as the trial judge.

[15] I think Ms. Reiter has entered the arena of advocacy to some degree. For example, at p. 2, she states, in effect, that "the goal" of punishment inflicted on Mr. Phillips by people at the school, "was pain, rather than learning." And at the end of her report, Ms. Reiter states: "I believe that Tom is now on the road to healing, but he needs and deserves an acknowledgement of and economic compensation for, the harm done, to help him along that road." In my view, the passage at p. 2 is clearly objectionable as argument, as are the words "and deserves" at p. 6.

[16] In the third paragraph of her report, Ms. Reiter gives reasons for why she believes the plaintiff's allegations of abuse are true, and these statements have been objected to as inadmissible argument. However, in my view, these statements may be admissible as reasons underlying the opinion that the plaintiff's behaviour is consistent with his allegation of sexual abuse.

[17] Other passages in Ms. Reiter's report are also said to be argument, for example at p. 4: "He later found outlets for his anger and sense of powerlessness by working as a bouncer for a while, and being hired by biker gangs as a hit-man to beat up people." I think this does amount to an argument that the plaintiff worked as a bouncer and as a hit-man, due to anger caused by having been sexually abused. The same applies to Ms. Reiter's discussions at pp. 4 and 5, where she implies that the plaintiff engaged in high risk games of "chicken," and racing trains to highway crossings, and high risk jobs such as tree-topping and rock scaling, because of the abuse inflicted on him. However, I am not persuaded that such statements indicate a loss of objectivity on the part of Ms. Reiter. It may well be her usual professional method of expressing her opinions about the potential effects of sexual and physical abuse on a child who goes through adulthood without successful treatment for those effects. Some of the passages that could be characterized as argument may be interpretations of the plaintiff's complaints of abuse and the effects of abuse, as Ms. Reiter believes Mr. Phillips probably experienced them. This may be the manner in which Ms. Reiter writes many of her reports, and it may be difficult for her to entirely avoid this kind of interpretation. Although it is highly preferable that statements of complaint made by the plaintiff should not be entangled with statements of opinion of the expert, I think some leeway can be allowed where the trial is by judge alone, rather than trial by jury. **Whether or not the style used by Ms. Reiter in writing her report may indicate unprofessional bias, can be explored on cross-examination.**

[18] In the result, only the mentioned passage at p. 2, **and the words "and deserves" at p. 6, need be deleted on this ground.**

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[24] Since the trial date is rapidly approaching, I would direct plaintiff's counsel to promptly obtain an edited report from Ms. Reiter, to request the mentioned letters from Ms. Reiter and Mr. Stewart, and to deliver copies of these documents to the other parties, upon receipt.