

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
PART 10, DIVISION 2 OF THE REVISED REGULATION (1984) UNDER THE
INSURANCE (MOTOR VEHICLE) ACT, AND THE
PROVISIONS OF THE *COMMERCIAL ARBITRATION ACT***

BETWEEN:

MEN, NN and DN

CLAIMANTS

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

**RULING RE: ADMISSIBILITY OF THE
SHEILA STEWART-BLAIR REPORT**

**Arbitrator: Donald W. Yule, Q.C.
Date of Ruling: July 16, 2008**

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INTRODUCTION

1. This is an arbitration pursuant to the provisions of s. 148.2 of the Revised Regulation (1984) under the *Insurance (Motor Vehicle) Act* and the provisions of the *Commercial Arbitration Act* to determine the amount of compensation to which the Claimants are entitled to recover from the Respondent pursuant to their underinsured motorist protection claims.
2. The Arbitration Hearing is set to commence August 25, 2008.
3. The Claimants have served an expert report dated October 24, 2007 from of Ms. Sheila Stewart-Blair, a rehabilitation consultant and principal of Rehab West: Rehabilitation Management Services Inc. (the "Report").
4. The Respondent objects to the admissibility of the Report.
5. Counsel have agreed to make their submissions in writing which I have carefully considered.
6. Briefly, the Respondent objects to the admissibility of the Report on two grounds. First it says that the facts and conclusions in the Report are not outside the experience and knowledge of a Judge or Jury. Second, the Respondent says that the facts in the Report are hearsay.
7. The Claimants' underlying claim is for damages under the *Family Compensation Act*, R.S.B.C. 1996 Ch. 126 arising out of the death of Mr. N in a motor vehicle accident on May 2nd, 2006. The Claimants are Mr. Ns' wife, MN ("Mrs. N") and their two daughters, DN and NN. Prior to his death, Mr. N had been providing various services to the Claimants. The general approach to the Report is that Ms. Stewart-Blair has determined, largely from discussion with others, what services Mr. N was providing to the Claimants and she then provides information regarding the cost of having those services provided on a commercial basis. At page 7 of the Report under the heading "Recommendations" Ms. Stewart-Blair

states:

“Recommendations are provided with the goal of replacing the services provided by DN to his wife, MN, and daughters, DN and NN.”

8. Mrs. N has a history of vascular dementia and had been a resident of the JBCC, a long-term care facility operated by the Vancouver Island Health Authority since December, 2005 (the “Care Centre”). Ms. Stewart-Blair is a registered nurse with a Master of Science Nursing Degree. The focus of her graduate studies was the rehabilitation of individuals with chronic illness and disability. She has been an independent rehabilitation consultant since 1992; has conducted hundreds of assessments of individuals with various types of personal injury and has been qualified as an expert in the field of rehabilitation in the Supreme Courts of British Columbia and Saskatchewan. Neither DN nor NN has any disability.

9. In determining what services Mr. N provided to the Claimants, Ms. Stewart-Blair received information from DN and NN and from TC, a nurse who has been involved with Mrs. Ns’ care at the Care Centre. Ms. Stewart-Blair also conducted a physical and functional assessment of Mrs. N at the Care Centre. From these sources Ms. Stewart-Blair determined that, for example, Mr. N took his wife out daily from the Care Centre for coffee, meals, drives or other activities. He paid her medical, extended health and dental insurance premiums and did her tax return. With respect to DN and NN, Ms. Stewart-Blair determined that Mr. N provided things such as transportation, moving assistance and handyman services. The Report then contains information regarding the cost of a companion for Mrs. N, the cost of having an income tax return completed, taxi fare rates in Victoria, the cost for courier service charges and estimates for the cost of handyman services, etc.

SUBMISSIONS

10. Both parties cite the decisions in *R. v. Mohan* [1994] 2 S.C.R. 9 and *R. v. Abbey* [1982] 2 S.C.R. 24 as leading cases on the admissibility of expert reports. I do not discern much difference between the parties regarding the applicable principles. One of those principles is “necessity” in the sense that the evidence will provide information that is likely to be outside the experience of a Judge or Jury. Furthermore, expert reports may contain hearsay evidence but it is only admissible to the extent that it forms the basis of the expert’s opinion. It is the application of these principles in the context of the somewhat unusual format of Ms. Stewart-Blair’s report that creates the disagreement.

SUBMISSION OF THE RESPONDENT

11. The Respondent objects to the admissibility of the Report in its entirety. Although Ms. Stewart-Blair is a registered nurse with experience in medical and rehabilitation nursing of individuals with chronic illness and disability, the Report essentially takes information provided by family members concerning the services provided by Mr. N and then sets out costs required to replace those services. Neither of these functions requires the application of expertise. Indeed the Report does not provide any expert analysis. Moreover, with respect to the claims of DN and NN, neither has any chronic illness or disability and neither requires any rehabilitative nursing attention. Further, the Respondent says that because the Report itself does not contain any expert opinion, any hearsay evidence included in the Report is not admissible for any purpose. Finally, experts should not be permitted to usurp the function of the trier of fact.

SUBMISSION OF THE CLAIMANTS

12. The Claimants assert that their claim for loss of services is not amenable to a simple mathematical calculation, and that the Report *inter alia*, summarizing one time versus continuing costs, has necessarily been provided to an economist to calculate the present value of expenses that will continue into the future. The Report does not purport to address the “ultimate issue”, which is whether and to what extent the losses suffered by the Claimants are compensable. The Report simply assists, together with the economist’s report, in providing evidence of the cost of the full range of services previously provided by Mr. N. It remains to be determined by the trier of fact whether the value of any of those lost services is compensable at law.
13. The Claimants also assert that their failure to prove, at the Hearing, hearsay information or assumptions upon which the Report is based goes only to the weight to be given to the Report and not to the admissibility of the Report.
14. Finally, in the alternative, the Claimants say that the Report is admissible with respect to the claim of Mrs. N as she does suffer from a chronic pre-existing disease for which Ms. Stewart-Blair’s qualifications and experience as a rehabilitative consultant would be “necessary” in the legal sense in determining what services are required to replace those lost as a result of Mr. Ns’ death.

DISCUSSION AND ANALYSIS

CLAIMS OF DN AND NN

15. With respect to the claims of DN and NN, and subject to the qualifications mentioned hereafter, I conclude that the "Recommendations" in the Report are inadmissible because they are not truly opinion evidence requiring the expertise of a medical rehabilitation consultant. To take as an example the claim of DN for delivery services, DN is the source of the fact that Mr. N used to deliver projects from her home to a printer 2 to 3 times a week. The Report then "recommends" courier services of 2 to 3 trips per week as an annual cost. To replicate the prior frequency of delivery services does not require any special expertise nor is it beyond the scope of experience of a Judge or Jury. The same analysis applies to the other recommendations for services for the other items for both DN and NN.
16. There are, however, two items with respect to NNs' claim where I consider Ms. Stewart-Blair to be expressing an opinion. The first relates to grief counselling. Ms. Stewart-Blair recommends at least six more counselling sessions with a registered psychologist because NN continues to have difficulty coping with the loss of her father and has now been offered a promotion by her employer that would involve relocating to C, leaving DN with the sole responsibility of looking after their mother. A recommendation for counselling is something that I would consider to be within the scope of expertise of a rehabilitation consultant and, accordingly, I rule that paragraph of the Report is admissible.
17. Paragraph 15 of the Report also includes an opinion, based on the assumption that NN in fact relocates to C, that she will return to Victoria more frequently than she otherwise would have, had Mr. N not been killed, in order to share the responsibility of looking after her mother. How often NN would have returned to Victoria in the absence of her father's death

and how often she may return in the future, assuming she moves, in fact, to C, strike me as being matters not requiring nor being appropriate for expertise as a rehabilitation consultant; the matter is going to be determined primarily on the basis of Ms. Ns' evidence, and possibly that of other family members. Accordingly, I rule that the opinion that NN will return to Victoria six additional times per year is not admissible.

18. As noted previously, the Report as it applies to the claims of DN and NN also includes the commercial cost of various services such as courier service, handyman service, storage locker fees, taxis and airfares. The cost of various services is considered to be within the scope of opinion evidence customarily given by rehabilitation experts notwithstanding that, to some extent, it may be hearsay information obtained from other service providers. Cost of care experts routinely include information regarding the costs of services in their reports. In *Jacobson v. Nike* (1996) 19 B.C.L.R. (3d) 63, the cost of care experts were Ms. Schulstad, a nurse with experience and education in rehabilitation nursing, and Ms. Harris, whose background was in occupational therapy. Levine, J. (as she then was) accepted these witnesses as qualified to provide expert evidence concerning both the care required and the costs of providing it. At paragraph 185 the Judge stated:

“I am satisfied from the evidence of his injuries and function and of the clinical records that the plaintiff requires personal attendant care and homemaker services to sustain or improve his physical and mental health. I am also satisfied that consultants with the experience, skill and training of Ms. Schulstad and Ms. Harris are qualified to assess his specific care needs and to provide expert evidence concerning the care required to meet his medical needs and the costs of providing for them.” [emphasis added]

In *Macdonald v. Neufeld* [Vancouver Registry CA014815/CA015657, September 3, 1993], the cost of care expert, Mr. Simpson, included in his report the cost of airplane tickets and other expenses for a traveling companion.

19. As a practical matter, the admissibility of costing information on this basis makes eminent sense. If it were not admissible as part of Ms. Stewart-Blair's report, then one of the Claimants could herself make the same inquiries, but adducing the evidence in that fashion would be subject to the same objection as hearsay. Thus, in the absence of admissions, the various service providers themselves would have to give evidence which would be both an inconvenience to them and an inefficient use of Hearing time. Accordingly, I rule that the costs information in the Report of commercially provided services in relation to the claims of DN and NN is admissible.


CLAIM OF MRS. N

20. For the reasons outlined above, the costs information contained in the Report of commercially provided services is admissible with respect to the claim of Mrs. N.
21. It appears to me that Ms. Stewart-Blair provides three opinions with respect to the claim of Mrs. N. The first is that "it appears that there has been a worsening of her dementia" [page 7 of the Report]. The second is that Mrs. N "needs to leave the facility more often" and additional companion services for two hours, 3 times per week are recommended [page 8]. The third is that Mrs. N is not eating well and should have an alternative meal provided 3 times per week [page 8].
22. With respect to the first opinion, I consider whether there has been a worsening of Mrs. N's dementia and, if so, the cause of it, to be medical opinions outside the expertise of a nurse/rehabilitation consultant. That opinion is to be excised from the Report.

23. With respect to the second and third opinions, respecting additional companion care and alternative meals, I consider that those opinions are within the scope of Ms. Stewart-Blair's expertise. Mrs. N does have a pre-existing, chronic illness. Ms. Stewart-Blair did conduct her own physical and functional assessment of Mrs. N. Her recommendations with respect to additional companion care and alternative meals are not merely the impractical task of mechanically costing on a commercial basis what Mr. N did in this regard but involves the application of some judgment, taking into account Mrs. N's own state of health.
24. To the extent that the opinions that I have found to be admissible are based upon assumptions or hearsay evidence from family members, those assumptions or hearsay evidence need to be proven at the hearing, otherwise the weight accorded to the opinions may be affected.
25. Finally, with respect to the paragraphs on page 7 of the Report under the heading "Summary and Impressions", in which Ms. Stewart-Blair summarizes the kinds of losses that the Claimants have sustained, I consider those paragraphs to be in the nature of argument or submission, matters properly within the realm of counsel and not appropriate subject matter for a rehabilitation consultant's report.
26. What remains then as admissible is all of Ms. Stewart-Blair's report from page 1 to the middle of page 6 (up to the heading "DN"); the paragraph on page 7 with respect to NN's difficulty dealing with the loss of her father and her offer of promotion to a position in C; the costing of the various services with respect to Mrs. N in items 1 to 6 on pages 7, 8 and 9 together with the opinions in paragraphs 2 and 3 respecting companion services and alternate meals; paragraph 14 on page 10 with respect to grief counselling for NN; and the Table summary of cost of services on pages 11 - 13 of the Report, and Ms. Stewart-Blair's CV at pages 14 - 15.

27. What is excluded from the Report as inadmissible is the following:
- a) The two paragraphs headed "DN" on page 6;
 - b) The last paragraph on page 6 and the first paragraph on page 7 under the heading "NN";
 - c) The section headed "Summary and Impressions";
 - d) Paragraphs 6 - 10 inclusive under the heading "DN" on page 9, except that the costs of commercially provided services outlined is admitted;
 - e) Paragraphs 11 - 13 and 15 on pages 9, 10 and 11 are inadmissible, except for the costs of commercially provided services which are admissible.

DATED at Vancouver, BC this 16th day of July, 2008.



Donald W. Yule, Q.C., Arbitrator