

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fabretti v. Singh*,
2012 BCSC 593

Date: 20120419
Docket: M070090
Registry: Vancouver

Between:

Jocelyn Fabretti

Plaintiff

And

**Aman Jit Singh, Satvir Singh Gill,
Greater Vancouver Transportation Authority
doing business as Translink, and
Her Majesty the Queen in Right of the Province of British Columbia
by her representative The Ministry of Transportation and Highways**

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Savage

Oral Reasons for Judgment

Counsel for the Plaintiff:

M. Kazimirski
G. Lilles

Counsel for the Third Party:

M.P. Ragona, Q.C.
J.D. Lattanzio

Place and Date of Trial:

Vancouver, B.C.
April 16-18, 2012

Place and Date of Judgment:

Vancouver, B.C.
April 19, 2012

Background

[1] The plaintiff has made a claim for loss of future earning capacity in her negligence action against the defendants for a motor vehicle accident. At the time of the accident, the plaintiff was engaged as a Regional Vice President (“RVP”) at Primerica, an independent financial services organization.

[2] To substantiate her claim for future earning potential, the plaintiff wishes to tender an expert report (the “Report”) by Barry Andruschak, National Sales Director for Primerica. A copy of the Report is attached hereto as Appendix A. In his Report, Mr. Andruschak provides an opinion as to the plaintiff’s employment capacity and projected earnings into the future.

[3] Mr. Andruschak also provides information about earning potential for RVPs generally at Primerica as well as specific examples of other RVPs’ past earnings, including the plaintiff’s. The defendant objects to the Report on a number of grounds, the primary one being that Mr. Andruschak is not properly qualified to render the opinion found in the Report respecting the plaintiff’s future earning capacity.

Arguments

A. The Plaintiff

[4] The plaintiff submits that the Report satisfies the test for expert opinion set out in *Kelliher v. Smith*, [1931] S.C.R. 672, per Lamont J. at 684:

To justify the admission of expert testimony two elements must co-exist:

The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.

The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.

[5] The plaintiff further refers to the Supreme Court of Canada’s decisions in *R. v. Abbey*, [1982] 2 S.C.R. 24 (*Abbey#1*), and *R. v. Mohan*, [1994] 2 S.C.R. 9. In *Mohan*, the Court stated the following, at 20:

Admission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule; and
- (d) a properly qualified expert.

[6] Respecting the last factor, the plaintiff submits that Mr. Andruschak's lack of formal training in calculating the plaintiff's future earning capacity is immaterial and that it is knowledge and expertise in a field that count, not the manner in which that knowledge and expertise have been acquired: *R. v. Marquard*, [1993] 4 S.C.R. 223 at 243. The plaintiff refers to the following excerpt from *Rice v. Sockett* (1912), 27 O.L.R. 410, cited in *The Law of Evidence in Canada* (3rd ed, Alan Bryant et al., (Markham: LexisNexis, 2009)) at 820:

The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith.

[Citations omitted; at 413 in *Rice*]

[7] In this case, the plaintiff states that Mr. Andruschak is the "old hunter", having gained "long-term and detailed knowledge of Primerica and...experience as a highly successful part of that company."

[8] Finally, the plaintiff says that it is not necessary that Mr. Andruschak be the pre-eminent specialist in the area of his opinion and that any discrepancies between his opinion and other experts can be remedied by tailoring the amount of weight given to it: *Lindholm v. Vankouehnett* (1998), 85 A.C.W.S. (3d) 591 (B.C.S.C.) at para. 7.

B. The Defendants

[9] The defendant's objection to the Report is based on three principal grounds. Firstly, the defendant says that Mr. Andruschak is not a properly qualified expert to

give an opinion on the plaintiff's future earning capacity. While the defendant acknowledges that Mr. Andruschak holds a senior position at Primerica and is obviously adept at selling its products, the defendant says that "[h]e has no educational background as an economist, or a business loss evaluator, and makes no mention of any previous experience performing this type of work."

[10] Furthermore, the defendant says Mr. Andruschak's supposed expertise as an expert for the purposes of assessing the plaintiff's future earning capacity is undermined by the fact that he is not giving an "opinion", apparent by his statement that the Report is a "best guess" and that his opinion is "inevitably speculative". Finally, the plaintiff submits that Mr. Andruschak's analysis in the Report is "extremely flawed", further undermining his purported expertise.

[11] Secondly, the defendant submits that the Report contains unsupported and hearsay comments related to the status of Primerica and the credibility of the plaintiff. As for the former matter, the defendant says the Report's allegations of Primerica's status in the insurance industry are unsupported by any studies or references. In one case where a report is referenced, "no mention of [on] what basis the conclusion was reached" is provided. Respecting the statements regarding the plaintiff's credibility, the defendant submits that "it is for the judge and jury to decided credibility, not Mr. Andruschak."

[12] Thirdly, the defendant says the Report does not comply with the *Supreme Court Civil Rules*, B.C. Reg 168/2009. The defendant submits that Rule 11-6(1)(f)(iii) requires that an expert report "must set out a list of every document the expert relied upon in forming his opinion." Specifically, the defendant says that Mr. Andruschak "fails to mention which documents he specifically looked at when quantifying the plaintiff's anticipated wage loss."

Analysis

A. The nature of expert evidence

[13] In *R. v. Abbey*, 2009 ONCA 624 (*Abbey#2*), the Ontario Court of Appeal made note of the danger of overreaching into the proper realm of the finder of fact that can arise as a result of expert opinion. The Court stated at para. 71:

Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material. The trier of fact must then decide whether to accept or reject the expert's opinion as to the appropriate factual inference. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases. Consequently, expert opinion evidence is presumptively inadmissible. The party tendering the evidence must establish its admissibility on the balance of probabilities...

[14] After listing the *Mohan* factors noted above, the Court goes on at para. 76 to re-state the *Mohan* test as a two step process:

First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence: see *Mohan*; *R. v. D.D.*, [2000] 2 S.C.R. 275; *J.-L.J.*; *R. v. Trochym*, [2007] 1 S.C.R. 239; *K. (A.)*; *Ranger*; *R. v. Osmar* (2007), 84 O.R. (3d) 321 (C.A.), leave to appeal to S.C.C. refused (2007), 85 O.R. (3d) xviii.

[15] It is accepted that the two-step process described above does not and was not intended "to alter the substance of the analysis required by *Mohan*": *Abbey#2* at para. 77. Rather, as the Court in *Abbey#2* discussed, distinguishing between the preconditions to admissibility and the gate keeping function of relevance and probative value is helpful in maintaining the distinctiveness of each line of inquiry. Before the Court is called upon to assess the relevance and probative value of an expert's report at the second stage, it is crucial that the expert evidence survive the preconditions to admissibility at the first stage:

Evidence that does not meet all of the preconditions to admissibility must be excluded and the trial judge need not address the more difficult and subtle considerations that arise in the "gatekeeper" phase of the admissibility inquiry.

(*Abbey*, at para. 78.)

[16] At para. 80, the *Abbey*#2 Court laid out the analysis at the first stage as follows:

In what I refer to as the first phase, four preconditions to admissibility must be established...:

the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;

the witness must be qualified to give the opinion;

the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and

the proposed opinion must be logically relevant to a material issue.

B. Proper Subject Matter

[17] In this case, I am satisfied that the plaintiff's future earning capacity is a subject matter that can potentially be the subject of expert opinion. Determining future probabilities and contingencies in a person's earning potential is a difficult and speculative task that benefits from specialized analysis and expertise. The main issue in these proceedings is whether Mr. Andruschak is properly qualified to render such an opinion.

C. Properly Qualified Expert

[18] Although the courts have allowed that a person need not be formally trained in an area of expertise to be considered an expert, the person's experience must relate directly to the subject matter of the opinion offered. After referring to the "old hunter" in *Rice* at 820, Bryant, referring to p. 25 of *Mohan*, states:

The proponent of the expert evidence must satisfy the trial judge that the proffered expert witness acquired special or peculiar knowledge through study or experience in respect of the subject matter of the opinion.

[Emphasis added.]

[19] In this case, the subject matter of Mr. Andruschak's Report is the plaintiff's future earning capacity. However, Mr. Andruschak's experience is properly viewed as concerning the earning possibilities for RVPs at Primerica generally; his experience is not in preparing objective reports on how such earning possibilities might manifest themselves in specific individual into the future.

[20] Thus, while having firsthand knowledge and experience in RVPs' earning potential at Primerica, based on their actual earnings, which is information that may be useful to the Court, Mr. Andruschak does not offer particular expertise in the subject matter of the Report, purporting to prepare an objective estimate of future income and thus income loss for a specific person. As such, on the basis that Mr. Andruschak does not qualify as an expert, the Report cannot be admitted on that basis.

[21] Given my findings regarding Mr. Andruschak's qualifications as an expert, it is unnecessary for me to canvass the defendant's arguments regarding the Report's formal compliance with the Rules. As I have said, however, much of the information in the report is potentially relevant and germane. I will leave it to counsel to review and discuss that matter amongst themselves. If required I will make further rulings on the proposed evidence. It may be that Mr. Andruschak's evidence would be better presented simply *viva voce* with the assistance of a few graphs or charts.

The Honourable Mr. Justice J.E.D. Savage

APPENDIX A

Barry Andruschak
National Sales Director
Office of Supervisory Jurisdiction
Primerica

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Victoria, BC V8P 2L5
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January 22, 2012

Marc A. Kazimirski
Kazimirski Law Corporation
1103 – 475 Howe St
Vancouver, BC
V6C 2B3

Dear Mr. Kazimirski:

Re: Jocelyn Fabretti
DOB: July 22, 1962
Accident Date: Jan12, 2005
File No:

I confirm that I received instructions to prepare a report on the work performance and potential of Jocelyn Fabretti.

I am solely responsible for the contents of this report.

I certify that I am aware that in giving my opinion my duty is to the court. I certify that I am aware that if called to give testimony in court I will do so in accordance with that duty. I certify that I am not an advocate for any party in giving this opinion.

Background and Expertise

For the information of the courts, my application for Independent Contractor Status as a Primerica Representative was accepted on January 23, 1986. I obtained my Life Agent level one license in the province of BC on April 1st 1986 making me the 31st

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person licensed in Canada for Primerica. I attained the level of Regional Vice President (RVP) on May 7, 1986. I was the first RVP promoted in Canada. All Other RVP Promotions have come after me. I opened the first Primerica office in BC in Burnaby in 1986. I now have 21 RVP offices between my home branch in Victoria and Winnipeg MB. I was the first person in BC to attain the level of Senior Vice president in May of 1989 and the first in BC to become National Sales Director in September of that same year. To attain those levels one must develop 6 direct Regional Vice Presidents whose combined businesses must be able to develop 150-200 clients a month.

I also had the privilege of exercising Primerica's unique ownership program by being asked to buy an additional Primerica business of 10 RVP's in Alberta, Saskatchewan and Manitoba in 2000. Primerica only allows sales of existing businesses to the most competent, trusted, and productive of its leadership team.

Details of Primerica

Primerica is the largest Independent Financial services marketing organization in North America. It was considered one of the best new IPOs of the year when the company went public April 1st 2010 after being a subsidiary of American Can/Primerica, then Travellers & Citigroup over the last 33 years.

The company was originally founded February 10, 1977 as the A.L. Williams Corporation. Its philosophy was to provide low cost term life insurance & mutual funds to middle income families through a network of independent agents. By 1984, it had grown from 85 representatives to over 100,000 independent agents working out of 7,000 offices. In less than 7 years since inception it had become the number one provider of term life insurance and one of the top providers of individual mutual funds in the United States.

The company opened for business in Canada in January 1st 1986 with our head office in Mississauga ON. In Canada, we are the largest financial services sales force in the country with over 7000 representatives working out of over 500 offices across the country.

The Investment Executive magazine has ranked our Canadian brokerage firm (PFSL) #1 in Canada for the past 11 years, in terms of Advisor Satisfaction.

Each office in Canada is independently owned and operated. The requirements to become a regional vice president/ branch manager are clearly stated in the company guidelines.

On average, less than 30% of every person recruited gets a license. Of the people that get licensed, less than 10% become regional vice presidents. The average earnings of RVPs in my organization are currently \$125,000/year. This is approximately 30% lower than the normal average due to the lingering effects of the 2008 Global Financial Crisis.

3.

Based on the small numbers of recruits & licensed reps that actually achieve the RVP level, it can be ascertained that any individual who becomes a qualified RVP, must possess above average abilities in the following key areas:

1. Strong work ethic.
2. Good credibility. People like them and trust them.
3. Tremendous faith in, and coachable to, the Primerica System
4. Good leadership skills. People want to follow them.
5. Good salesmanship and professional client development skills.
6. Able to maintain a positive attitude, and sense of humor in the face of adversity.
7. A strong family life and good partnership with their spouse.
8. Competitive.

It was my observation that Jocelyn Fabretti possessed all of these characteristics.

I have known Jocelyn Fabretti since 1995 when she first joined our Surrey office under the Supervision of Senior VP, John Keller. People with RVP potential are discussed continually at the Senior Leadership level so as to provide extra mentoring and support to them. Jocelyn was identified as one of those candidates and I was involved in mentoring and coaching her very early on in her career along with John Keller.

Problems that can restrict an individual's ability to grow their Primerica business are:

1. Poor personal health, serious illness or accident to self or loved one.
2. Divorce or poor personal life
3. Poor personal money habits
4. More than one child under the age of 11

Poor personal life, divorce, family illness, bad money habits, has ruined many a promising career in any field. Self employed, commission-based businesses such as Primerica are especially vulnerable in the early years.

It has been my experience and observation that the older the children, the less hour to hour attention they need and the easier it is for a mother (or father) to direct time and effort to their careers and/or business. Also, it is legal in BC for an 11 year old to babysit a sibling in their parents' absence. 12 is the legal age in BC for a child to babysit someone else's children.

Jocelyn's two children, Amanda and Mitchell, were 10 and 13 at the time of the accident, and so had none of the above impediments until they were all injured in the accident January 12, 2005. Incidentally, Jocelyn had an additional advantage to her

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Primerica business in that her husband Terry was also licensed and very supportive in the business until he was injured in the accident.

Income Potential

This opinion will be a "best guess" based on knowledge and experience gained through personally developing over 20 RVPs as well as observing dozens more RVP promotions from my colleagues and watching the success and failures of those promotions over my 25 year career with Primerica.

It is acknowledged that this opinion is inevitably speculative. Primerica is a very personality driven business; not all representatives succeed, and life events, such as the ones listed above can intervene to impede success.

This opinion is gained from observing a select RVP Peer group. The Peer group was narrowed down using these criteria:

1. RVPs who were promoted within 3- 5 years of Jocelyn's 2001 promotion date.
2. RVPs who live and do business in a similar Geographical Area. In this case, Lower Mainland/Vancouver Island as opposed to Northern BC, other provinces, or the US.
3. RVPs with similar business philosophy, systems and focus. Obviously most would then be selected from within my organization. One was selected from outside my organization, but has very similar characteristics and circumstances to Jocelyn.
4. Age at promotion, and similar age children

The Reports from this Peer Group used are all available from the Primerica Online website at locations available to RVPs and above. They are, but are not limited to, Trend Trak, Rep Status profile, BC 2011 Cash Flow Leaders bulletin.

For simplicity sake, the broad analysis of cash flow that Jocelyn would have averaged and likely be earning today, could be linked to the average income of the 21 Active RVPs in my organization.

The combined cash flow of these 21 active RVPs in 2011 was approx. \$2,657,000. Dividing that number by 21 is approx. \$126,000/yr.

These numbers are approximately 30% below the normal average income of RVPs across Primerica Canada because of the lingering effects of the 2008 Global Financial Crisis. This would mean the average incomes would be closer to \$166,000.

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In my professional opinion, and based on Jocelyn's length of time as an RVP (2001-present if she were able to remain an RVP), Jocelyn's income could be linked to this range + or - 20%.

For the information of the court, RVP earnings are derived from primarily personal and commission split (or override) income from the sale of mutual funds and insurance. Additional income comes in the form of monthly and quarterly performance bonuses. In the early years of an RVP's career, the majority of his or her income would come from personal sales.

As their team builds, and their business grows and matures, more and more income would come from overrides (mature licensed agents producing business without the assistance of the RVP) and from trail commissions.

Mutual fund companies pay trail commissions to the RVP based on a percentage of the total assets under management of the RVP's branch office at the end of each calendar month. It's approximately .0024/12. For example, if the RVP had \$1million of AUM he or she would earn \$200 a month. As the assets grow through market and sales growth to 10 million the trail commissions would be \$2000 a month and so on.

Jocelyn's current cash flow is based primarily on that source of cash as well as from past clients who contribute monthly to their investments through pre-authorized check.

As the numbers will show, you will see the effect that the global downturn has had on our cash flows but as the market continues to recover, all assets under management of all RVPs will continue grow as well, and hence, the trail commission cash flows.

With permission, and thanks, to the following individuals for allowing me to share their statistics in this report: RVPs
 Additional RVPs in this peer group were willing to participate in this report by giving me their numbers. They will also be contacted if further time or necessity permits.

Peer Group Comparison

Cash Flow History 1995- 2011 (multiples of \$1000)

RVP	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11
	\$4	14	22	27	21	29	30	39	29	37	22	26	15	20	7	7	6
	\$40	67	94	113	140	181	160	149	124	191	201	234	295	242	162	241	193
	\$28	57	103	75	82	117	65	88	82	85	109	118	144	139	65	77	69
				20	17	37	51	35	46	65	64	81	99	91	71	71	107
								24	22	28	29	53	54	54	47	75	80

- 2003 was the year BC permitted the licensing of part time life & mutual funds agents. That expanded our recruiting, licensing and retention of agents tremendously.
- Bold numbers denote the year each was promoted to RVP
- Mr. Watt is not in my organization but lives and works in the same area as the Fabrettis and has similar age children.
- Ms. Garrod was actually mentored by Ms Fabretti

Taking an average range of cash flow of this peer group in the 2-3 years after each was promoted to RVP, the average range of cash flow was between \$78,000 and \$86,000. Jocelyn's third year was \$37,000, which is about half the average of this peer group. This would tend to reduce my first estimate of \$125,000 - \$165,000 to \$62,500 - \$82,500.

However, the next report I examined is Jocelyn's personal Trend Trak report for the years 2003 - 2005. In 2003 Jocelyn's "hierarchy size" or licensed agent numbers almost tripled from 5 agents in Jan 2003 to 14 in Dec 2003. This led to a 27% increase in insurance volume and a 41% increase in Securities volume and a 28% increase in total cash. Most notable to me was that she received a 61% increase in bonuses from her team insurance volume. This bonus is difficult to receive if you haven't developed a team. In fact 80% of all RVPs in Canada never receive a bonus. She received these bonuses in 7 out of 12 months in the year prior to the accident.

This data, coupled with her strong growth numbers in 2003 and 2004, plus the new allowance of part time licensing in BC, plus the securities sales boom we all participated in in 2005 - 2008, leads me again to estimate Jocelyn's income upward in keeping with the momentum she had obviously worked hard to build. In addition, her children were just becoming more of an independent age, which would have allowed her even more time to build on the momentum she had in 2004.

It is my opinion that Jocelyn's average cash flow from 2005 - 2011 could more closely be tied to my own RVP team's cash flow performance. Based on all the data I've looked at and factoring in Jocelyn's competitive nature, her competencies and her increased experience in the industry as an RVP, her average cash flow would be more in the range of \$82,500 - \$125,500.

Furthermore, since 2005, a number of other improvements to Primerica's compensation has taken place.

Most notably, securities production bonuses which are paid quarterly, can increase an RVP's income by \$300 - \$3000 a month. Primerica shares are now being awarded quarterly to top producers increasing their net worth. And most recently, enhanced ownership guidelines based on years as an RVP. The top ownership offering (making our businesses worth in the several hundreds of thousands to millions of dollars in some cases) would be offered to Agents who have been RVP's for 20 years or more. If Jocelyn had been able to remain an RVP she would be in her 11th year.

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Footnotes

1. Investment Executive 2011 Dealers Report Card
 2. Primerica Online website - Promotion Guidelines
- Step 7: Become a Regional Vice President**
- 95% Commission + Bonuses
 - Have six District Leaders (or above) in place
 - Submit \$20,000 in Bonusable Premium during two consecutive months (minimum \$8,000 in each month)
 - Have acceptable persistency
 - Execute RVP Agreement
 - Provide upline RVP with replacement leg(s) - RVP's choice: one Regional Leader or two Division Leaders or three District Leaders
 - Be securities licensed and securities principal licensed to receive full securities compensation¹
 - Must have Office of Supervisory Jurisdiction approval
 - Be full time
-
3. Primerica website - company recruiting and licensing statistics
 4. Experiences and estimations from other Senior Primerica Leaders
 5. Primerica online website 2011 cash flows Barry Andruschak Organization calculation of averages.

This Concludes my report.

January 22, 2012



Barry Andruschak
National Sales Director
Office of Supervisory Jurisdiction
Primerica