Reading-in Discovery Evidence at Trial

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A. INTRODUCTION

The Ontario Court of Appeal has stated that one of the "prime purposes of examinations for discovery" is to "obtain admissions or other information which will reduce the expense of preparing for and participating in the action."[1]

Indeed, the reality is that trial preparation begins at the discovery stage, where it is important to obtain clear, concise, and germane admissions that can help prove a fact or legal issue in the case, narrow the issues, and/or eliminate the need to call a witness.

Rule 31.11 of the *Rules of Civil Procedure*[2] is the vehicle for reading-in the discovery evidence of an adverse party at trial. This paper will review the difference between "reading-in" discovery evidence as opposed to using it for impeachment; the legal rules and principles applicable to read-ins; tips for securing the best discovery evidence for read-in purposes; and making effective use of the read-ins at trial.

B. USING DISCOVERY EVIDENCE: READING-IN vs. IMPEACHMENT

a. The Distinction

The evidence obtained by an adverse party at his[3] examination for discovery can be used different ways at trial, including being read-in as contemplated by rule 31.11 or being used for impeaching that party.

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[1] *Gemini Group Automated Distribution Systems Inc. v. PSW Corp.*, 1993 CanLII 314 (ONCA) [*Gemini*]
[2] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [the *Rules*].
[3] For consistency, the pronouns "his" and "he" have been arbitrarily selected for use throughout this paper.

A "read-in" as contemplated by rule 31.11 involves a party formally tendering into evidence as part of *that party's* case a portion or portions of the *adverse* party's discovery transcript (i.e. a Q&A or series of Q&As). The portions of the discovery transcript read-in become part of the substantive evidence at trial, which the trier of fact may accept or reject when determining a factual or legal matter in the case.

Reading-in an adverse party's discovery evidence in this manner, as substantive proof to advance one's own case, is distinct from referring to a portion or portions of the adverse party's discovery evidence during cross-examination of that witness for the sole purpose of impeachment. When discovery evidence is used for impeachment purposes, it is used to show that the adverse party has given inconsistent answers to the same question (i.e. the question asked at discovery and the question again asked at trial). Consequently, the discovery evidence is not used to establish the truth of that evidence *per se*, but simply to show that the party giving the evidence is not credible.

b. The Distinction Illustrated

1. *Case Synopsis*

In 2022, my Partners, Sloan Mandel and Aleks Mladenovic, and I conducted an informed consent medical malpractice trial. Briefly, Mr. Denman suffered from a brain arteriovenous malformation ("AVM"). The main issue in the case was whether any of the three Defendant physicians who rendered treatment to Mr. Denman in respect of his AVM obtained his informed consent to any or all parts of what was likely from the outset to be a multi-step course of medical intervention (multiple embolizations followed by surgical resection of the AVM). During one of these steps (the 3rd embolization, which was to be performed in conjunction with surgical resection the next day), Mr. Denman suffered a catastrophic brain bleed that left him profoundly and permanently disabled.

A hotly debated sub-issue in the case was whether the Defendant physician who performed that 3rd embolization ("Dr. Pereira") had been present during a key consultation on August 5, 2014 between Mr. Denman and one of the other Defendant physicians; and, if so, what (if anything) Dr. Pereira told Mr. Denman about the cumulative range of risk of suffering a

permanent neurological deficit associated with undertaking the proposed multi-step course of medical intervention. It was the Plaintiffs' theory that Dr. Pereira did not attend the consultation at all. It was the Defendants' theory that Dr. Pereira not only attended the consultation but provided Mr. Denman with information about the cumulative risk.

2. *Evidence Read-In*

To prove the Plaintiffs' theory that Dr. Pereira did not attend the consultation or, in the alternative, to undermine his purported memory of the information he alleged to have told Mr. Denman, the Plaintiffs relied upon the fact that: a) Dr. Pereira was not licenced by the College of Physicians and Surgeons of Ontario at the time of the consultation; and b) Dr. Pereira did not chart his alleged consultation with Mr. Denman.

To underscore these important facts, the Plaintiffs read-in the following admissions from Dr. Pereira's examination for discovery:[4]

> Q. Yes, you beat me to one of my next questions, which was do you remember the date upon which you obtained your licensing from the College of Physicians and Surgeons of Ontario?
>
> A. I don't recall but I can get it to you.
>
> *Answered by undertaking email dated February 14, 2020:*
> Dr. Pereira received his license from the College of Physicians and Surgeons of Ontario on August 15, 2014.
>
> …
>
> Q. In medical school you were taught that it's a physician's obligation to maintain an accurate medical record?
>
> A. Yes.
>
> Q. And part of obtaining an accurate medical record requires the physician to chart the relevant exchanges between he and his patient?
>
> A. Yes.
>
> …
>
> Q. Because of the unique circumstances of your having come over from Switzerland and perhaps not having your CPSO licensing at the time it may

[4] Read-ins of Dr. Pereira (Exhibit 6) at Qs. 17, 29-30, 172-173.

very well be that you did not meet with Mr. Denman on August 5, 2014; is that fair?

A. Well, I don't know the circumstances of it and I don't recall specifically when I got my licence and everything.

Q. Right. I think your counsel already agreed that you'll provide to me the date upon which you received your licensing, but if it was after August 5, 2014 then we know you did not meet with Mr. Denman on August 5, 2014; is that right?

A. Yeah.

These admissions would later be used to argue in closing submissions (along with other evidence relied upon by the Plaintiffs) that since Dr. Pereira was not legally permitted to give medical advice to a patient in Ontario and, even if he had been, he was obligated to chart his encounters with patients yet no such chart entry existed, the judge should find as a matter of fact that Dr. Pereira did not attend the subject consultation.

3. *Evidence Used for Impeachment*

During his examination-in-chief at trial, Dr. Pereira not only maintained that he attended the consultation, but that, based upon his "standard practice", he would have informed Mr. Denman at that consultation that there was a cumulative range of risk of *20-30%* of suffering a permanent neurological deficit associated with the proposed multi-step course of medical intervention. At his examination for discovery, however, Dr. Pereira testified that his "standard practice" would have been to quote this risk as *25-35%*.

By contrast to either of Dr. Pereira's answers, it was the Plaintiffs' theory of the case (based upon expert evidence) that the cumulative range of risk was, in fact, *30-50%*.

In other words, Dr. Pereira's discovery evidence that he quoted a 25-35% risk to Mr. Denman at the consultation was *not* helpful to the Plaintiffs' case on a substantive basis since: a) it undermined their theory that he was not present at the consultation; and b) it undermined their theory that the cumulative range of risk was 30-50%. Consequently, it did not behoove the Plaintiffs to read-in Dr. Pereira's discovery evidence as part of their

case or the judge would be permitted to consider that evidence when determining whether Dr. Pereira was present at the consultation and what, in fact, the cumulative range of risk was that Mr. Denman faced.

Nevertheless, it was still helpful for the Plaintiffs to put that discovery evidence to Dr. Pereira during his cross-examination to impeach him as it showed that for someone who professed to have a so-called "standard" or "invariable" practice, there was variability in his answers about what he alleged he would have informed Mr. Denman.

A (*partial*) excerpt of Dr. Pereira's impeachment on this issue has been reproduced below, which exchange took place after Dr. Pereira testified at trial that he would have told Mr. Denman that he faced a cumulative range of risk of 20-30%:[5]

> Q. Let's go to your discovery transcript, just so we can make sure we've referenced this properly. Page 56. Questions 188 through 190…
>
> "Question: Do you specifically recall what the cumulative risk range was that you say you provided to Mr. Denman prior to your August 2014 intervention? Interjection by counsel, Mr. Black: Associated with the proposed treatment, as opposed to the native risk of non treatment? Question 189: Associated with the series of embolizations that you believe were likely to ensue, followed by a resection of his AVM? Answer: Yeah. Five to ten percent, five to ten percent, ten to fifteen percent. Question: You're giving me different pieces of a cumulative risk. I'm asking if you gave to him a cumulative risk. Answer: Yeah. I would say that depending on the number of sessions, probably we would. His complications would be, the risks would be around 30 percent, plus or minus five percent." [As read]
>
> I read that exchange accurately. Right?
>
> Yes.
>
> Q. And is that what you told, you believe you told Mr. Denman? Or do you now believe you told him 20 to 30 percent? Which one?

[5] Transcript of Dr. Pereira's Cross-Examination, June 13, 2022 at pp. 149-151.

> A. Well, you, the number came after we discussing (*sic*) about five to ten percent, five to ten percent. What we communicate (*sic*) the patient per sessions, and the number of total procedures that they would, they had the risk, we are talking here retrospective, that he could potentially have to have his AVM treated.
>
> Q. Doctor, you testified in-chief to the same five to ten percent, five to ten percent, ten to fifteen, in-chief. You gave the same component parts. What's changed is your cumulative risk total. At discovery, you said your invariable practice was 25 to 35. And at trial, you say it's 20 to 30. And I'm just asking you which one it was. I'm not trying to debate it. I'm just trying to figure out what your evidence is. Which time were you being accurate in the evidence that you gave?
>
> A. Yeah. I, the most, the accurate, it's between 25 to 30 or 35.

This exchange would have planted the seed of doubt into the trial judge's mind as to the veracity of Dr. Pereira's trial evidence, not only on this particular issue but on other topics as well.

C. LEGAL RULES & PRINCIPLES FOR READING-IN EVIDENCE

Recall the quote cited at the outset of this paper by the Ontario Court of Appeal regarding the importance of obtaining admissions at discoveries. Rule 31.09 of the *Rules* "gives teeth" to that principle, as it attempts to crystallize discovery admissions so that an adverse party may rely upon those admissions when preparing for and conducting a trial. Rule 31.09 requires a party to correct in writing and in advance of trial any answer given at discoveries that was or has since become incorrect or incomplete. The failure to do so may preclude that party from introducing the new/corrected evidence at trial.

Rule 31.11 of the *Rules* specifically deals with reading-in those admissions at trial. The key sub-rules are (1) and (3).

Sub-rule 31.11(1)(a) describes by whom and when discovery evidence may be read-in at trial:

> At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given

> on the examination for discovery of, the adverse party…if the evidence is otherwise admissible, whether the party or other person has already given evidence or not.

This sub-rule reminds us that questions and answers given at a discovery which are sought to be read-in at trial must still satisfy the law of the admissibility of evidence for trial. "While certain questions may be permitted at the discovery stage, matters of admissibility and weight are left to the trial judge."[6] Questions and answers that elicit hearsay evidence for instance, are permissible at the discovery stage because a witness is required to testify on the basis of his knowledge, *information*, and belief, but that does not necessarily mean that this hearsay evidence will be permitted to be read-in at trial.[7]

Subrule 31.11(3) describes the power of the Court to direct a party to read-in other portions of the transcript, which may qualify the excerpt otherwise sought to be introduced:

> Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the trial judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced.

This sub-rule reminds us of the trial judge's inherent discretion to ensure trial fairness. Where a proposed read-in does not accurately or fairly portray the evidence without additional excerpts of the transcript, then the party seeking to read-in those limited excerpts may be required to give a more fulsome picture.

There are surprisingly few decisions that address the legal principles to be applied to rule 31.11(3). One exception is the Honourable Mme. Justice Lax's decision in the matter of *Anderson v. St. Jude Medical, Inc.*,[8] which decision was ultimately cited in *Watson & McGowan's Ontario Civil Practice 2022*. Her Honour provides a comprehensive analysis of rule 31.11(3), which for brevity has been summarized/paraphrased below:

- A party has a *prima facie* right to control the read-ins of the adverse party; the latter does not have an equivalent right to control the content of the read-ins sought to be tendered as evidence.

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[6] *Cremer v. Law Society of Ontario*, 2022 ONSC 1672 at para. 20 (CanLII) [*Cremer*].
[7] *Zonneville v. Andrews*, 2014 ONSC 2380 at para. 11 (CanLII) [*Zonneville*].
[8] *Anderson v. St. Jude Medical, Inc.*, 2010 ONSC 1824 at paras. 11-20 (CanLII) [*Anderson*].

- The qualification on that right is fairness; namely, ensuring that the trier of fact is not misled by a partial admission or one that is qualified or explained elsewhere.

- The qualifying read-in must be specific to the answer sought to be read-in, rather than merely related to or connected with it.

- The scope of the qualification must not go beyond a direct answer to the question asked.

- If the evidence read-in fairly represents an answer to the question asked, no qualification or explanation will be necessary or permitted.

- Where an answer read-in is clear and complete, separate and distinct questions and answers should not be read under the pretext of providing context, regardless of what bearing they may have upon the issues.

- Rule 31.11(3) should *not* be used to allow parties to:

    - Recast their own examination more favourably;
    - Introduce evidence favourable to their case so as to avoid properly tendering that evidence through their witnesses at trial; or
    - Editorialize an answer that is otherwise complete and responsive to the question.

Given that a party seeking to read-in specific evidence may be required to read-in additional evidence, the latter of which may not be helpful to that party's case, there is authority for allowing a party to withdraw a proposed read-in should it turn out that the additional portions of the transcript he is being directed to read-in are unwelcome. In other words, if the party seeking to read-in a specific excerpt is told it must be "all" (i.e. not just that entry but others as well), then the party may decide to choose "nothing."

In the matter of *Dix v. Canada (A.G.)*, after hearing submissions by both parties, the Honourable Mr. Justice Ritter directed the Plaintiff to read-in additional/qualifying portions of the Defendant's transcript; however, in doing so, His Honour offered the Plaintiff "an out":[9]

[9] *Dix v. Canada (A.G.)*, 2002 ABQB 196 at para. 44 (CanLII) [*Dix*].

> I am also satisfied that should the Plaintiff desire not to continue with a particular read-in following this ruling, he has the option of indicating to myself that the read-in is withdrawn and I will consider it to be so. I draw support for this conclusion from the following statement taken from Stevenson and Côté in their publication Alberta Civil Procedure Handbook 2002 at p. 170, supra:
>
> > The true exceptions where a party can read in his own answers are narrow. R. 214 (4) says that where the questioning side has read in some answers, the party examined may add other answers "so connected" that they ought not to be omitted. There are fewer cases on that than one might think. The test seems fairly narrow. The witness cannot insist that all he has said on the subject be read in. But he can add to half an answer, or one which is misleading out of context. If the party reading in does not like the addition, but the Judge allows it, the party reading in can withdraw both.

Similarly, a party that has read-in evidence from an adverse party's discovery is not precluded from leading contradictory evidence. As stated by the Ontario Court of Appeal in *Akhavan v. Taheri*:[10]

> Second, and in any event, a party reading in evidence from the adverse party's examination for discovery is not precluded from adducing other evidence that may rebut discovery evidence that the party reads in: John W. Morden & Paul M. Perell, *The Law of Civil Procedure in Ontario,* 4th ed. (LexisNexis: Toronto, 2020), at §9.86. The evidence that is read in becomes part of the totality of the evidence available for the trial judge to consider. Like any evidence, the trial judge may accept some, all or part of the particular witness's evidence.

D. SECURING THE BEST EVIDENCE FOR READ-IN PURPOSES

a. Preparing for the Examination

Given the importance of securing good quality discovery admissions, it would be prudent for counsel to consider the following when preparing to examine an adverse party:

1. Theory of the Case

Have in mind a preliminary/basic theory of the case as a whole or even regarding a single important issue in the case. Consider in advance what evidence/admissions would need to

[10] *Akhavan v. Taheri*, 2022 ONCA 483 at para. 11 (CanLII) [*Akhavan*].

be adduced at trial to prove that theory. Is there, for instance, an assumption upon which an expert opinion has been based, which assumption needs to have factual foundation in the evidence before the opinion may be persuasive or the expert may even testify?

2. Burden of Proof

Where possible, use helpful "legal language" in questions that meet the burden of proof (e.g. "probable", "likely", "would", etc.). There is much greater value to reading-in testimony about what a witness believes was "likely" as opposed to what "may" or "could" have been the situation, occurrence, observation, etc.

3. Reverse-Onus

Be mindful of special burdens of proof, including reverse-onuses (by way of statute or case law); such as in the case of pedestrian/bicycle-motor vehicle, rear-end, or left-turn collisions. Questions should be designed to include the factual circumstances that trigger the reverse-onus (e.g. "The front of your vehicle collided with the *rear* of the Plaintiff's motor vehicle?" as opposed to "Your vehicle collided with the Plaintiff's motor vehicle?").

4. Witnesses

Part of preparing for trial involves considering who has what (i.e. which witness would need to be called to provide certain information). Sometimes, the need to call a particular witness may be obviated with a simple admission by the adverse party (e.g. if an issue in the case is the colour of the traffic light when the Defendant entered the intersection, if the Defendant admits the colour was amber then there may be no need to call an independent witness who otherwise had nothing to offer but that same information).

5. The Pleadings

This advice may be trite, but the adverse party's pleadings should be read carefully before that party is examined. Often, the Defendant not only has not read his own pleadings, but he will readily give evidence that rebuts those pleadings.

Statements of Defence in motor vehicle cases, for instance, tend to include the same boiler allegations, such as a denial about the Plaintiff wearing a seatbelt. If asked, however, a Defendant driver will often give evidence that he approached the Plaintiff's vehicle moments after the crash and observed the Plaintiff to be seated in his vehicle wearing his seatbelt. After obtaining that type of dispositive admission, Defence counsel ought to be asked if there is any evidence (fact, opinion, document, etc.) upon which the Defendant is relying in support of that pleading. Recall that pursuant to rule 31.09, the Defendant has a duty to correct an answer prior to trial or may otherwise be precluded from leading any new/corrected evidence.

b. Conducting the Examination

Equally important to the preparation for the examination is its execution. The following tips are, humbly, offered:

1. Establish that an answer means an understanding.

At the outset of the examination, counsel should establish a "rule" whereby the adverse party agrees that if he does not understand a question, then he will ask for clarification, otherwise it may be assumed that the question was fully understood. The establishment of this rule should form part of the evidence read-in at trial, making it more difficult for the witness to "wiggle out" of an impeachment by suggesting he misunderstood the question at the time of his discovery.

2. Stick to one-point Q&As.

A proper question should involve a single-point question to elicit a single-point answer. Most of the time opposing counsel will refuse to allow a witness to answer a compound question but, even if the refusal is missed, but for very non-controversial topics (e.g. not just the number of a driver's licence plate but the fact that it is an Ontario licence plate), it is not advisable to try to jam a bunch of evidence into one question because later down the line, once a theory of the case has been better established, it may be that only a portion of

this compound evidence is worth reading-in, but the evidence *within* a single Q&A cannot be read-in on a piecemeal basis.

3. Avoid the use of vague words.

Each Q&A should be an "island" that can stand on its own without having to resort to any other portion of the transcript for clarification or qualification. Using vague words or pronouns (e.g. "it", "she", "there", etc.) that could, in the context of the case, refer to any number of different things, places, people, events, dates, or otherwise increases the risk of additional portions of the transcript being required for clarification.

4. Ask clear questions.

Make sure questions are clear: a) keep questions concise; b) avoid the use of double negatives; and c) end a question with a request for a yes/no confirmation (e.g. "right?", "correct?", "true?", "fair?", "agreed?").

One issue for which to look out when using confirmation questions, however, is that sometimes a witness will answer in respect of the subject-matter of the question rather than the request for confirmation. For instance, if counsel has reason to believe that a Defendant driver did *not* honk his horn prior to the crash asks: "Prior to the crash, you *did not honk your horn*, correct?" and the Defendant answers "no", it may be unclear if the Defendant meant "no, I did not honk my horn" or "no, that is not correct, as I did honk my horn." Listen carefully to answers and, where needed, seek clarification so that unhelpful evidence is not inadvertently read-in at trial based upon a misunderstanding.

5. Make sure the witness answers the question asked.

Where a witness evades (deliberately or otherwise) a question by giving an answer to a question that was never really asked or gives more information than was demanded by the specific question, call out the problem and insist upon a direct answer to the specific question asked. Alternatively, if the witness gives a long-winded answer that contains an important "nugget" amongst a bunch of useless information, ask a follow-up question that

hones-in on that evidence (e.g. "So, if I understood you correctly, you did not honk before the impact?"), which follow-up question can be the one selected for reading-in at trial.

6. Envision the transcript.

The transcript should be a clear line-by-line flow of Q – A – Q – A. It is not advisable to read-in five pages of jumbled transcript that is all meant to be in answer to one question. As the examination is being conducted, envision the transcript being typed and if people are talking over one another, call out the problem and re-phrase the question so that it can be seamlessly read-in at trial.

E. MAKING EFFECTIVE USE OF READ-INS AT TRIAL

a. Selecting Appropriate Admissions

Going through the adverse party's discovery transcript and culling the excerpts to be read-in is one of the most difficult challenges. Give consideration to the following:

- Does the evidence support my theory of the case without otherwise undermining some other aspect to the case?
- Is the evidence clear, concise, and unequivocal or do I run the risk of being directed by the judge to read-in additional portions of the transcript to clarify the evidence?
- Do I need this evidence before the Court before I can ask certain questions of a particular witness (e.g. an expert)?
- Is the witness no longer available to testify at trial?[11]

b. Negotiating the Read-Ins

The practical reality is that before the moment that read-ins are tendered to the Court, they are first discussed with the other side. It is generally better to deal with issues in advance of taking up a judge's time, in the midst of the trial, especially if there is a dispute that is going to require a ruling. Better to become organized and prepared with a proposed plan

[11] The use of discovery read-ins in this circumstance (e.g. where a witness has since died) is a broader topic, which will not be covered by this paper.

for the Court about how many questions will need a ruling, when the parties might wish to make submissions, and when in the course of the trial (including the outset) it may be best to address the issue of read-ins. With that said, it is not necessarily recommended to disclose proposed read-ins to the other side too far in advance as it may tip-off the other party regarding an important theory, a weakness in that party's case, or where a witness will need careful briefing.

In the event that the trial judge has to rule on the issue of read-ins, it is prudent to:

- Take a second look at the read-ins to consider how necessary they are to the case and whether it is worth the time that may be spent on a motion and/or the risk that additional/qualifying evidence may need to be read-in to the record.

- Ensure that the judge has a proper factual context for the proposed read-in before or when submissions are made.

- Consider whether each read-in should be dealt with individually or whether any can be grouped together and dealt with categorically as one would do at a refusals motion (there is no right or wrong answer to this approach – the strategy will differ case-by-case or even question-by-question).

- Prepare a chart, similar to what is done in a refusals motion, to help the judge find the references and see the context at a quick glance. **See Appendix A**.

- Ensure that a record is kept of the judge's ruling (aside from the trial transcript), so that once the judge has ruled on each question, the proposed read-ins can be revised (if necessary) and otherwise admitted into evidence without delay.

c. Actually "Reading-In" the Evidence

Read-ins can literally be read aloud into the record during the trial and/or submitted in writing, subject to the Court's preference. They can also be dealt with pretty much at any time, though there may be a strategy to ensure the read-ins have been entered before a particular witness has been called. If there are many read-ins, then a written document is generally preferrable. That document would be marked as a *numbered* exhibit (as opposed to a *lettered* exhibit), since it is substantive evidence which the judge may consider. Each

party's read-ins should be marked as a separate exhibit (e.g. if there are 3 Defendants, their read-ins should not be Exhibit 1 collectively but rather Exhibits 1, 2, and 3, respectively).

d. Relying upon the Read-Ins

In practice, read-ins can be helpful in a number of ways:

- To set an evidentiary foundation upon which to premise a question, which can be particularly helpful if the question may otherwise be considered an improper hypothetical question.
- To provide an evidentiary basis upon which an expert may give an opinion, that may otherwise have been based upon an assumption.
- To impeach the party whose discovery evidence was read-in.
- To rely upon when making closing submissions, since the read-ins are part of the substantive evidence of the trial.

4. CONCLUSION

The importance of read-ins underscores the importance of discoveries. While discoveries should involve many open-ended questions to ensure that it is a real learning process about the facts and evidence in the hands of the adverse party, discoveries should also involve focused, distinct, closed questions that can provide for clear evidence to be read-in at trial.

For questions or comments, Deanna may be reached at: dgilbert@trlaw.com[12] or 416.868.3205.

[12] Note, due to Deanna's recent marriage, in due course, her last name will be changed to Harrington and her email will correspondingly change.

APPENDIX A: SAMPLE CHART FOR A READ-INS MOTION

CONTESTED READ-INS: DR. RADOVANOVIC

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
1	**Q. 46**: Because of Mr. Denman's presentation it would have been too risky for him to proceed immediately to surgical resection, you and the AVM team at the Western believed that it would be a more prudent approach for him to undergo a series of embolization procedures prior to engaging in surgical resection; is that fair? A. Yes.	**Q. 47**: And because Mr. Denman would require not only a series of embolization procedures, but also a surgical resection to effect a cure of his AVM, the cumulative risk associated with those multiple procedures would be greater than the risk for a patient who is capable of proceeding straight to surgical resection; is that fair? A. Not necessarily because the goal of the embolization is to reduce the risk of the surgery, so when we analyze a series where 30 percent of the patients had pre-operative embolization and then we extract from this experience a certain risk of the surgery that weighs in the effect of the embolization. In those cases it is perceived that without embolization the risk would have been higher. **Q. 48**: I get that. But you mentioned to me that perhaps up to 30 percent of the patients undergo embolization before surgical resection? A. Yes.	**Q&A 46 is clear, complete, does not mislead, and fairly represents an answer to the question asked.** Q&As 47-49 neither qualify nor explain the answer given at Q. 46; and As 47-49 go beyond a direct answer to Q. 46. Q. 46 is a straightforward question confirming Dr. Radovanovic's belief that Mr. Denman's AVM was too risky to proceed directly to resection and that he would require a series of embolizations prior to engaging in the surgical resection. Dr. Radovanovic's answer was "yes". The question does not inquire about cumulative risk, nor an estimate of what percentage of AVM patients can proceed straight to surgery.
	Q. 50: Those patients who can go straight to resection would be subject to a lesser cumulative risk of adverse outcome than those who required not only a resection, but also a series of preceding embolization procedures. A. Yes, because most of the AVMs that are resected without embolization they		**Q&A 50 is clear, complete, does not mislead, and fairly represents an answer to the question asked.** Q&As 47-49 neither qualify nor explain the answer given at Q. 50; and As 47-49 go beyond a direct answer to Q. 50. Further, there is no way to evaluate what

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
	have a lower risk from the outset. They are lower grade AVMs.	**Q. 49**: That means that 70 percent of your patients can go straight to resection? A. Yes.	is meant by the answer to Q. 47 because we do not know what the risk to Mr. Denman would be had he proceeded straight to a surgical resection, without embolization (the answer to Q. 47 only indicates that Dr. Radovanovic believes that it might be higher). So at best, even if the additional series of questions must be read-in, the answers are of no relevance to the issues in the case.
2	**Q. 55**: We'll get to this a little bit later, but the results of the ARUBA study became available prior to the treatment and care that you and your AVM team provided medical care and management to Mr. Denman (*sic*) in or about May of 2014. Is that right? A. Yes.	**Q. 56**: Did you consider whether Mr. Denman would have been a candidate that met the ARUBA study criteria? A. He would not have been a candidate because of previous hemorrhagic episodes; he would not have met the included criteria for the ARUBA Trial.	**Q&A 55 is clear, complete, does not mislead, and fairly represents an answer to the question asked.** Q&A 56 neither qualifies nor explains the answer given at Q. 55 and A. 56 goes beyond a direct answer to Q. 55. Q. 55 simply confirms that the results of the Aruba study became available to Dr. Radovanovic and the AVM team prior to May 2014. It does not ask whether Mr. Denman would have been a candidate for inclusion in the study. *This is a textbook example of defence overreach seeking a qualified read-in beyond a direct answer to a question for the purpose of bolstering its case.*
3	**Q. 84**: He's 54 or 55 years of age when you see him in January of 2015. He's got 10 more years of work life expectancy and ability to go out and earn	**Q. 83**: When you made your recommendations to Mr. Denman in January of 2015 had you considered his clinical pre-history in the years following	**Q&A 84 is clear, complete, does not mislead, and fairly represents an answer to the question asked.**

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
	a meaningful income. Did you discuss with him the prospect of delaying your surgical intervention for a period of time so as to permit him to continue to earn income? A. No.	his 2011 Gamma Knife radiosurgery? And what I mean by that, and I'm happy to take you through the records, is that following his Gamma Knife surgery, his clinical condition and his functionality improved significantly. He had gone back to work; he was travelling 35 to 40 percent of the time; he was playing ping-pong; he was no longer receiving LTD; life was good. Did that summary that I just gave to you impact upon any of your recommendations regarding what type of treatment Mr. Denman required and when he should have that treatment? A. Yes. So he had a subarachnoid hemorrhage from a ruptured aneurysm, so his visibility at the time was not due to the treatments with the Gamma Knife; it was due from his bleed, from the aneurysm. And typically patient (*sic*) take time to recover and he recovered very well. He had hemianopia (*sic*) after that as a complication of the embolization at the time, but otherwise, yes. I remember very well that he was active, a very highly functioning gentleman, was	Q&A 83 (a preceding Q.) neither qualifies nor explains the answer given at Q. 84; and A. 83 goes beyond a direct answer to Q. 84. Q. 84 addresses whether Dr. Radovanovic considered the prospect of delaying surgical intervention given Mr. Denman's work life expectancy. The answer to the question was "no". Q. 83 (a preceding Q.) did not address work life expectancy, but rather, addressed other unrelated past issues of Gamma knife radiosurgery in 2011; a return to travel; a return to ping-pong; the absence of LTD; etc. *This is a textbook example of defence overreach seeking a qualified read-in beyond a direct answer to a question for the purpose of bolstering its case.*

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
		travelling. I think - - yes, he had a very active professional life and we had - - I remember had to schedule the different embolization and the treatments around his own schedule. And I think that's very important when we pose an indication because the whole purpose of treating an AVM is to prevent the bleeding and potentially a devastating bleed. So obviously we would not subject someone who is already disabled or unable to understand or not functioning to treatments to prevent a bleed for someone who is already severely disabled. Whereas, the reasoning, and most o the patient (*sic*) with AVMs that we treat are functional and the goal of the treatment is to preserve that function. This is the justification of the treatment. So yes, to answer your question, yes, we take that into account, or at least I do in my view.	
4	**Q. 116**: You've said that, and I understand that. But doesn't the patient need to know what the cumulative risk is for the course of medical management that's being recommended to him as opposed to information in silos without understanding what that means in a global context?	**Q. 107**: Assume for the moment that his care was in keeping with the standard practice that you had observed such that he provided a risk number, with you also providing a risk number for your own surgical intervention, did either of you provide a combined risk number, a cumulative risk to the patient before he	**Q&A 116 is clear, complete, does not mislead, and fairly represents an answer to the question asked.** Q&As 107, 108, 117 and 119 neither qualifies nor explain the answer given at Q. 116. This bundle goes beyond a direct answer to Q. 116.

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
	A. Yes.	elected to proceed with your recommendations? A. I don't specifically remember exact… **Q. 108**: Would it have been your standard practice to provide a cumulative risk number for the combined procedure? A. Yes, but at this stage it is difficult to quantify an exact mathematical risk on a single patient. So the risk I usually quote is the risk, in my experience, in the literature, but it is - - it is difficulty to square exact number for a patient of that complexity. **Q. 117**: So what was communicated to Mr. Denman about the cumulative risk of the combined procedure that was being recommended jointly by you and Dr. Pereira? A. As I said before, all the premise of the discussion was introduced by the concept that surgery - - that embolization will reduce the risk of surgery and that surgery - - because the complication (*sic*) of embolization of AVM occur over several days after. The bleeding occurred several days, not necessarily a bleeding during the procedure or right after the	Q. 116 seeks confirmation that Mr. Denman needs to know the cumulative risk for the course of medical management that is being recommended to him as opposed to information and silos. The answer to the inquiry is "yes". The question did not seek an answer to standard practice, difficulty providing an estimate, exact mathematical risk, nor why embolization on the front end might reduce the risk of surgery on the backend.

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
		procedure. And in Dr. Pereira's experience the bleeding in the past, that he had in the past, occurred a few days after 48 hours/72 hours after the procedure. And therefore the goal of the surgery early after the embolization was to reduce that risk. **Q. 119**: If I want to buy a jacket and a part of pants, I want to know what the cost of it is. I don't really care that it's cheaper if I buy them both together, but individually I want to know what the cost of my outfit is. What was the risk to which Mr. Denman was being subjected should he elect to follow the recommended course of treatment that you and Dr. Pereira jointly recommended to him or is that something that you did not provide to him? A. We provided a discussion about that. I don't recall what we provided a specific sum number because, again, I don't believe that it is possible to have an accurate number or a range. But from the strategy that we offered him, we believed in what we told him that the risk of these interventions would	

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
		make the risk of the other intervention less and that overall the risk of having or taking this risk upfront would be less than the cumulative risk of having a bleed or being disabled from his AVM during his life.	
5	**Q. 173**: And in fact, as at May 2014, all though you might hope that embolization was likely to be a cure, it was more likely that some form of resection would be necessary to effect the cure that was the ultimately goal. Is that fair? A. To my understanding, yes. In Dr. Ter Brugge's understanding or Dr. Pereira's, at that stage I don't know.	**Q. 170**: Given that, was it your expectation that Dr. Ter Brugge would discuss with the patient a cumulative risk to which he was subject? A. Yes. But I have to say that during this conference we did not finalize a plan of three embolization and a surgery. What I reported here and what we discussed by Dr. Ter Brugge, and I can just defer to what's, you know, his expertise, that this AVM can be embolized and what I wrote here, and I don't specifically remember what he said, but that embolization might potentially eliminate the shunt and if this is not achieved then we'll proceed to surgery. **Q. 171**: It might potentially eliminate the shunt or it might not? A. Yes. **Q. 172**: The fact that resection might ultimately be necessary to effect a cure was something that everybody was aware	**Q&A 173 is clear, complete, does not mislead and fairly represents an answer to the question asked.** **Nevertheless, the Plaintiffs are content to read-in questions 170-172.**

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
		of. A. Absolutely.	
6	**Q. 182**: Your expectation was though as at May of 2014 surgery was likely to be necessary; resection was likely to be necessary? Correct? A. Yes. **Q. 183**: Your expectation was that Mr. Denman be informed of your opinion; correct? A. Yes. **Q. 184**: And your expectation was that somebody would have provided to Mr. Denman the cumulative risk to which he would be subject if he were to undergo a series of embolization procedures followed by the surgical resection that you felt to be likely? A. Yes, discussed about the cumulative risk without necessarily having a strict number. **Q. 185**: Yes, it could be a range; correct? A. Yes.	**Q. 119 [*Note:* This qualifying read-in was already requested in defence grouping #4]**: If I want to buy a jacket and a part of pants, I want to know what the cost of it is. I don't really care that it's cheaper if I buy them both together, but individually I want to know what the cost of my outfit is. What was the risk to which Mr. Denman was being subjected should he elect to follow the recommended course of treatment that you and Dr. Pereira jointly recommended to him or is that something that you did not provide to him? A. We provided a discussion about that. I don't recall what we provided a specific sum number because, again, I don't believe that it is possible to have an accurate number or a range. But from the strategy that we offered him, we believed in what we told him that the risk of these interventions would make the risk of the other intervention less and that overall the risk of having or taking this risk upfront would be less than the cumulative risk of having a bleed or	**Q&As 182-185 are clear, complete, do not mislead, and fairly represents answers to the question asked.** **Nevertheless, the Plaintiffs are content to read-in questions 176-179.** Qs. 176 through 179 and 182 through 185 all relate to a May 2014 expectation and the need to disclose a cumulative risk with respect to elective medical intervention. Conversely, Q. 119 relates to a January 29, 2015 discussion that neither qualifies nor explains the answers given at Qs. 176 –179 and 182 –185.

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
		being disabled from his AVM during his life. **Q. 176**: Was it your expectation that Mr. Denman would be informed of your belief that surgical resection would likely have been required regardless of the prior embolization procedures? A. That surgery was an option I the case the embolization would not cure the AVM and obliterate the shunt completely. **Q. 177**: Not just that surgery was an exercise of last resort, but the surgery was in fact going to be the likely outcome if your opinion was communicated to him? A. "Likely" is a little bit vague. **Q. 178**: Fifty-one percent. Likely means 51 percent. A. That it's a possible outcome; not a last resort, but it's a very possible outcome. And yes, I would have expected that this was discussed with Mr. Denman. **Q. 179**: Not just that it was a possible outcome, but as at May of 2014 your	

Defence Grouping	Read-Ins	Requested Qualifying Read-Ins	Plaintiffs' Response
		belief was that surgery was a probable outcome. A. Yes. However, what I – and again, I cannot remember the exact discussion, but if I believe what I read from my notes, the discussion was to give first - - to offer the option of embolization with a possible cure and this would be the team's opinion. So then my belief - - or the weight of my belief in that is also relative.	