SUPREME COURT OF NOVA SCOTIA
Citation: *Russell v. Goswell*, 2013 NSSC 383

Date: 20131129
Docket: Tru No. 268149
Registry: Truro

Between:

Erika Russell

Plaintiff

v.

Michelle L. Goswell

Defendant

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated December 17, 2013.
Judge:	The Honourable Justice Patrick J. Duncan
Heard:	By correspondence
Final Written Submissions:	August 30, 2013
Counsel:	Janus Siebrits, for the Plaintiff Clarence A. Beckett, Q.C. and Jeremy P. Smith, for the Defendant

By the Court:

Introduction

[1] The plaintiff, Erika Russell, has filed an action against the defendant alleging that she has suffered personal injuries as a result of a motor vehicle accident that occurred July 21, 2005. The trial of the claim is scheduled to be heard by a jury beginning March 31, 2014.

[2] A series of pretrial motions have arisen. Some have been previously dealt with. There remain four outstanding questions for determination.

Issues

1. Is the plaintiff entitled to cross-examine Dr. Edvin Koshi, a witness for the defendant who has filed his expert's report pursuant to **Civil Procedure Rule 55**?

2. Are five letters authored by Dr. Neil Bower admissible as a treating physician's narratives within the meaning of **Civil Procedure Rule 55.14**?

3. Are the letters or reports of Registered Psychologist Elizabeth Pace admissible as treating physician narratives within the meaning of **Civil Procedure Rule 55.14**?

4. What procedure will be followed at trial to determine the question of whether the plaintiff's claim for general damages falls within the minor injury threshold of section 113B of the **Insurance Act** ("cap")?

Analysis

Issue 1: *Is the plaintiff entitled to cross-examine Dr. Edvin Koshi, a witness for the defendant who has filed his expert's report pursuant to* ***Civil Procedure Rule 55?***

[3] The defendant has filed the expert report of physiatrist Dr. Edvin Koshi in accordance with **CPR Rule 55**. The plaintiff seeks to cross-examine the doctor on his report when the matter comes on for trial.

[4] The circumstances under which the court will receive the testimony of an expert is governed by **Rule 55.13** which states:

> Testimony by expert
>
> 55.13 (1) A party to whom an expert's, or rebuttal expert's, report is delivered must determine whether to admit or contest the proposed qualification, and the admissibility of the opinion, by no later than the finish date.
>
> (2) A party may not call an expert whose qualifications, and the admissibility of whose opinion, are admitted, unless one of the following applies:
>
> (a) the expert is also a fact witness and the direct examination is confined to the facts;
>
> (b) the party is notified, before the finish date, that another party requires the expert to be called for cross-examination;
>
> (c) the presiding judge is satisfied that justice requires that the expert testify.
>
> (3) A party must call an expert whose qualifications are contested, prove the report through the expert, and conduct any supplementary direct examination on qualifications.
>
> (4) A party must call an expert the admissibility of whose opinion is contested, prove the report through the expert for the purpose of obtaining a ruling on admissibility, and conduct no further direct examination unless the presiding judge permits.
>
> (5) A judge who determines that calling an expert was clearly unnecessary may order the party who caused the expert to be called to indemnify another party for the expenses caused by the expert being called.

[5] The plaintiff relies upon the provisions of **CPR 55.13(2)(b)** or **(c)** in support of the motion. As to the first of these arguments, counsel for the plaintiff says that notice was provided to the defendant, prior to the Finish Date, that Dr. Koshi's attendance for cross-examination is required.

[6] Alternatively, the plaintiff argues that justice requires that Dr. Koshi be made available for cross-examination as it is the "tried and tested method of challenging" an opinion that "…may be dressed up in scientific language that may be accepted as virtually infallible and having more weight than it deserves". (per Sopinka J. in *R. v. Mohan* 1994 SCJ 36)

[7] The plaintiff acknowledges the general prohibition against a party calling their own expert witness to testify, but says that requiring the witness to attend for cross-examination is permitted. If it is later determined that the calling of the witness was not necessary then the remedy for the defendant is to seek costs as provided for by **Rule 55.13(5)**.

[8] The defendant submits that the plaintiff misinterprets the effect of **Rule 55.13(2)(b)** and says it does not provide authority for the court to permit cross-examination of an expert witness where the expert's qualifications and the admissibility of the report are admitted. Counsel argues that the provision is intended solely to permit cross-examination on qualifications or admissibility of the report and does not extend to a general right to require attendance for cross-examination.

[9] With respect I cannot agree with the defendant's interpretation of the section. **Rules 55.13(3)** and **(4)** deal specifically with the procedure to follow when either the admissibility of the expert's qualifications or the admissibility of their report is not admitted by the opposing party.

[10] **Rule 55.13(2)** begins by stating that if the expert's qualifications and the admissibility of their report are admitted, then that witness cannot be called by the party relying on the report. In the matter before the court, those admissions have been made. Therefore the defendant cannot call Dr. Koshi. But that is not the end of the matter.

[11] The section goes on to state "unless one of the following applies:". What follows are exceptions to that general prohibition against calling an expert whose qualifications and report have been agreed to be admissible. One of those is where "another party" (the plaintiff in this case) "requires" the witness for cross-examination and has given notice of that intention by the Finish Date.

[12] In my view, the purpose of **Rule 55.13(2)(b)** is to make it clear that if notice of intention to cross-examine is provided, then the defendant is no longer subject to a prohibition against calling their own expert witness and conducting a direct examination of that witness.

[13] The defendant does not take issue with the plaintiff's submission that notice of an intention to cross-examine Dr. Koshi was given by the Finish Date. Having satisfied that pre-condition the motion is granted. Dr. Koshi may be called and subject to both direct and cross-examination.

Issue 2: *Are five letters authored by Dr. Neil Bower admissible as treating physician narratives within the meaning of* ***Civil Procedure Rule 55.14****?*

[14] The plaintiff was treated by Dr. Neil Bower. Counsel has filed chart notes as treating physician narratives within the meaning of **Rule 55.14**. The defendant does not object to the admissibility of those notes.

[15] The plaintiff also seeks to admit the following documents authored by Dr. Bower as "treating physician narratives":

1. letter dated December 12, 2005 to Beth Reage of the Section B insurer;
2. letter dated May 16, 2006 to Beth Reage;
3. letter (short) dated September 13, 2006 to counsel for the plaintiff;
4. letter (long) dated September 13, 2006 to counsel for the plaintiff; and
5. letter dated November 30, 2010 to counsel for the plaintiff.

[16] In support of admission, the plaintiff submits that these documents were created during the currency of Dr. Bower's treatment of the plaintiff as her family physician. To the extent that the documents express expert opinions, the plaintiff says this is permitted by **Rule 55.14(1)** which states:

> 55.14 (1) A party who wishes to present evidence from a physician who treats a party may, instead of filing an expert's report, deliver to each other party the physician's narrative, or initial and supplementary narratives, of the relevant facts observed, and the findings made, by the physician during treatment. see also, Rules 55.14(6) and 55.15.

See also, **Rules 554.14(6) and 55.15.**

[17] The defendant objects to the admissibility of all of the documents on the basis that they are not treating physician "narratives", but rather are expert reports which do not meet the requirements of **Rules 55.01 to 55.05**.

[18] The defendant further submits that the documents contain opinion evidence which the doctor is not qualified to proffer. The defendant says the plaintiff should not be permitted to evade the application of the rules in this way.

[19] The issue of what constitutes a "narrative" was previously considered in *Shaw v. J.D. Irving Limited* 2011 NSSC 487. At issue was the admissibility of what was characterized as a "medical/legal type report" prepared by the treating physician. Scaravelli J. first reviewed **CPR 55** as it relates to the distinctions between an expert report and a treating physician narrative:

> 4 Civil Procedure Rule 55 governs rules relating to the filing of expert reports and physician narratives.
>
> 5 Mandatory time lines are imposed on expert report (sic), specifically six months before finish date with rebuttal reports three months before finish date. There is no automatic right to oral discovery of an expert. Written questions are permitted within 30 days of delivery of the expert report, and the expert has 30 days to respond. Supplemental questions can only be asked with the leave of the court.
>
> 6 Rule 55.04 sets out mandatory contents for expert reports. The expert must make detailed representations to the court. The report must include detailed information in support of the opinion as well as detailed information required in order for the court to assess the weight to be given to the opinion.
>
> 7 Rule 55.14 distinguishes between an expert's report and a treating physician's narrative. The narrative is confined to "the relevant facts observed and findings made, by the physician during treatment". No discovery of any kind is permitted including written questions. The rule limits the scope of the physician's testimony at trial.
>
> 8 Rule 55.14(6) provides for the exclusion of expert opinion evidence of a treating physician who provided a narrative instead of an expert's report, unless the party offering the evidence satisfies the court that the other party received the opinion and the material facts upon which it is based, sufficient for the other party

> to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination.
>
> 9 Rule 55.15(1) provides for an advanced ruling by the court as to whether narratives provide sufficient information to permit a treating physician to testify to an opinion contained in a narrative.

[20] In relation to the report before him he held:

> 13 This report is identified as a "medical/legal type report" and responds to requests from plaintiff's counsel for a medical/legal type report. This report was provided in the context of a pending trial and not within the context of a physician's narrative during treatment. Moreover, the report delivered to the defendant 10 weeks prior to trial is unequivocal as it relates to causation. Under the circumstances, I do not view this report as a physician narrative. To admit this report into evidence would, in my view, circumvent the rule relating to expert opinion. As a result, the report containing expert opinion fails to comply with Rules 55.03 and 55.04 relating to mandatory time lines for filing and contents.

[21] To assess the character of the letters in question I will measure them against the language of **Rule 55.14**. They must be "a narrative of the relevant facts observed and findings made, by the physician during treatment".

[22] So, the three questions that must be asked about each letter are:

1. Does it set out relevant facts observed?
2. Does it set out findings made? and
3. Were the facts observed, and findings arrived at, made during treatment?

[23] Before carrying out that analysis, it is important to contrast what is required to be in an expert report before an opinion can be admitted:

> Content of expert's report
>
> 55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
>
> (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;

(b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;

(c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;

(d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;

(e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

(a) the expert's relevant qualifications, which may be provided in an attached resumé;

> (b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;
>
> (c) reference to all publications of the expert on the subject of the opinion;
>
> (d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;
>
> (e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

[24] In this case the plaintiff's objective is clearly a desire to tender a series of expert opinions provided by Dr. Bower, without having to meet the requirements for admission of his opinion in the form of an expert report. The differences between the criteria for admission of an expert report and of an opinion in a treating physician narrative are so striking as to make it apparent that what constitutes a treating physician's narrative must be strictly construed to avoid, as Scaravelli, J. expressed, any circumvention of **Rule 55.04**.

Letter dated December 12, 2005 to Beth Reage

[25] The first paragraph of this letter relates the doctor's observations of the plaintiff's condition, some of which come from the plaintiff's self-reporting of symptoms. Dr. Bower specifically refers to his observations made August 10th and December 5th of 2005. The first paragraph therefore is not the source physician narrative, but rather is a report derived from physician narratives.

[26] The balance of the letter consists of opinions which emanate from the doctor's observations and findings but which are not themselves part of the physician's narrative. For example, there is no evidence that "during treatment" the doctor observed and found, as he opines, that "Ms. Russell is unable to return to her position at Dollarama as a cashier due to her subjective complaints of pain with activity". Dr. Bower then offers opinions on how various types of activities or "job demands" would be impacted by "her symptomology".

[27] I am not satisfied that this letter, consisting of a reporting of months old observations by the doctor of the patient, leading to a statement of opinions on future functional capability of the plaintiff complies with **CPR 55.14**.

[28] I find this letter is not a treating physician's narrative and therefore it will not be admitted as such.

Letter dated May 16, 2006 to Beth Reage, of the Section B insurer

[29] The first one and a half paragraphs are simply a statement of the facts which would likely be drawn directly out of the clinical notes. Assuming I am correct in this the contents are not the original narrative, but are drawn from those notes. As such, there is no reason for the plaintiff to enter this into evidence since the chart notes are already agreed upon as being physician narratives.

[30] The balance of the letter is problematic. It goes beyond what was done in treatment. It expresses opinions on the prognosis and on possible future treatments. It includes an opinion about an opinion that was expressed by a third party with respect to the continuation of physical treatment modalities. After expressing his views, Dr. Bower continues by acknowledging that he is "not a consultant in physical pain or physiatry". He then speaks of his experiences with other patients and how it might relate to his treatment of the plaintiff.

[31] In my view the most material part of the content does not amount to "relevant facts observed and findings made, by the physician during treatment". It is not, therefore a physician's narrative and it is not admissible under **Rule 55.14**.

Letter (short) dated September 13, 2006 to counsel for the plaintiff

[32] This is a brief letter responding to a question posed by plaintiff's counsel. Dr. Bower responds that certain treatment modalities are:

> …reasonably necessary medical expenses the need which is related to the motor vehicle collision. I do believe that these forms of therapy are all the direct result of her motor vehicle collision.

[33] This letter is not part of a treating physician's narrative. It does not respond to any of the three questions which **CPR 55.14** generates. The contents are strictly an opinion that speaks to eligibility for expense reimbursement and to causation.

[34] I find that this letter is not admissible as a treating physician's narrative.

Letter (long) dated September 13, 2006 to counsel for the plaintiff

[35] This letter begins:

> Regarding your letter dated July 4, 2006, here is my opinion on several issues as you present them. You ask if Erika's injury is more substantial than what I would understand to be a minor injury.

[36] What follows are Dr. Bower's opinions on issues that go to the question of whether general damages should be capped as a minor injury. The letter speaks to the extent of the injury, the expected duration of the symptoms, and the relationship between the injury and the plaintiff's functional abilities. He offers an opinion on causation and provides a prognosis.

[37] This letter is clearly not what is contemplated by **Rule 55.14** as a treating physician's narrative. Any opinions contained in this letter could only be admitted as part of an expert's report.

[38] I find that this letter is not admissible as a treating physician's narrative.

Letter dated November 30, 2010 to counsel for the plaintiff

[39] Most of this letter is a recitation of what the plaintiff told Dr. Bower about the impact that her injuries have had on her functional capacity. This is hearsay and ultimately the jury will have an opportunity to hear the plaintiff's own testimony and make its own findings of fact. Dr. Bower concludes:

> We therefore see that the motor vehicle crash has had a long term and lasting impact on her educational, social, personal, and vocational life. I believe these

> effects are long term, and/or permanent at most. These have been in spite of pharmacological and physical modalities of treatment.

[40] Nothing in this letter speaks to observations made by the physician during treatment or any findings that he made during treatment. It is, at best, an opinion on causation that depends upon the proof of facts of which he has no personal knowledge. This letter is clearly not what is contemplated by **Rule 55.14** as a treating physician's narrative.

[41] I find that this letter is not admissible as a treating physician's narrative.

Conclusion

[42] I find that none of the five letters are admissible as treating physician narratives within the meaning of **CPR 55.14**.

***Issue 3**: Are the letters or reports of Registered Psychologist Elizabeth Pace admissible as treating physician narratives within the meaning of **Civil Procedure Rule 55.14**?*

[43] The plaintiff seeks to have certain letters or reports prepared by a registered psychologist admitted into evidence at trial pursuant to **Rule 55.14** as "Treating Physician's Narratives".

[44] The defendant objects, arguing that a psychologist is not a "physician". It is submitted that having failed to meet this pre-condition for admissibility Ms. Pace's reports cannot be admitted under this rule.

[45] **Rule 55** establishes a regimented approach to getting the evidence of experts before the court. It has the effect of ensuring that expert reports are prepared in a standardized format that can minimize the need for discoveries and for *viva voce* testimony from these experts, while ensuring that complete, objective and helpful expert evidence is put before the court on relevant and material issues. The rule applies across all areas of expertise, including the health professions.

[46] **Rule 55.14** creates a limited exception to these otherwise strict requirements for admitting an expert's report into evidence. Admission of a treating physician's narratives is permitted without compliance with the usual form of report required of experts generally although admission is subject to some conditions.

[47] The Rule reads:

> Treating physician's narrative
>
> 55.14 (1) A party who wishes to present evidence from a physician who treats a party may, instead of filing an expert's report, deliver to each other party the physician's narrative, or initial and supplementary narratives, of the relevant facts observed, and the findings made, by the physician during treatment.
>
> (2) A narrative, or initial and supplementary narratives, must be delivered within the following times:
>
> (a) no more than thirty days after the day pleadings close in an action, if the treatment occurs before the action is started;
>
> (b) within a reasonable time after treatment is provided during the course of an action and no later than the finish date;
>
> (c) as directed by a judge in an application.
>
> (3) A party who receives a narrative, initial narrative, or supplementary narrative expressing a finding may, within a reasonable time, file a rebuttal report that conforms with Rule 55.05.
>
> (4) A party may not obtain a discovery subpoena for, deliver interrogatories to, deliver written questions to, or obtain an order for discovery of a treating physician who provides a narrative rather than an expert's report.
>
> (5) A party who calls a treating physician at a trial, or presents the affidavit of a treating physician on an application, may not advance evidence from the physician about a fact, finding, or treatment not summarized in a narrative or covered in an expert's report.
>
> (6) A judge who presides at the trial of an action, or the hearing of an application, or who makes a determination under Rule 55.15 must exclude expert opinion

> evidence of a treating physician who provides a narrative instead of an expert's report, unless the party offering the evidence satisfies the judge that the other party received information about the opinion, and about the material facts upon which it is based, sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician.

[48] The plaintiff's argument, if correct, has the potential to significantly undermine the structure and purposes of **Rule 55** by overly broadening the number and type of professionals whose reports can avoid the strictures of a formal report, on the basis that they are a "treating physician." I do not accept an outcome that contributes to that extension of the **Rule**.

[49] The plaintiff's argument, in my view, fails on the legal interpretation of who is a "physician" within the meaning of **Rule 55**.

[50] **Webster's Third New International Dictionary of the English Language Unabridged**, (Chicago: Encyclopedia Britannica, 1986) defines a "physician" as "a person skilled in the art of healing; one duly authorized to treat disease; a doctor of medicine".

[51] The same Dictionary defines a "psychologist" as "a student of the mind or of behaviour; a specialist in one or more branches of psychology". The term "psychology" is defined as "the science of mind or of mental phenomena and activities; a systematic knowledge about mental processes; a method of obtaining knowledge about mental processes; … the science of behaviour….".

[52] Psychologists are valued professionals in society who may provide clinical assessments and counselling. In this regard they are like any number of other health professionals who give assistance to the public. They are not, however, doctors of medicine. This fundamental distinction is manifested in how the professions are distinguished in provincial statutes regulating various professions.

[53] The statutory characterization of a physician, as distinguished from other professions, was carried out previously in this Court by Hood J., in *Gillis v. Roy Stutley Plumbing and Heating Ltd.* 2011 NSSC 514 (on appeal on unrelated grounds). In that case it was held that a chiropractor was not a "physician" and so the narrative was not admitted under **Rule 55.14**.

[54] Justice Hood's approach and reasoning seems sound to me. She began by reviewing the **Medical Act**, S.N.S. 1995-96, c.10 which defines a medical practitioner in section 2(s):

> (s) A medical practitioner means a person who is registered in the Medical Register, Defined Register, Temporary Register or Medical Education Register;

[55] It then clarifies in section 3 that:

> Interpretation of medical practitioner
>
> 3 The words "duly qualified medical practitioner", "duly qualified practitioner", "legally qualified medical practitioner", "legally qualified physician", "physician" or any like words or expressions implying a person recognized by law as a medical practitioner or member of the medical profession in the Province, when used in any regulation, rule, order or by-law made pursuant to an Act of the Legislature enacted or made before, at or after the coming into force of this Act, or when used in any public document, includes a person registered in the Medical Register, Temporary Register, Defined Register or the Medical Education Register who holds a licence. 1995-96, c. 10, s. 3.
>
> (emphasis added)

[56] By contrast the word "physician" does not appear in the **Psychologists Act**. S.N.S. 2000, c. 32, s. 1.

[57] The **Medical Act** also defines the "practice of medicine" at ss. 2(w):

> (w) A practice of medicine includes, but is not restricted to,
>
> ...
>
> (iii) offering or undertaking to prevent or to diagnose, correct or treat in any manner or by any means, methods, devices or instrumentalities any disease, illness, pain, wound, fracture, infirmity, defect or abnormal physical or mental condition of any person,

[58] I take the view that the definition of the "practice of medicine" set out in section 2(w)(iii) of the **Medical Act** might be broad enough to capture what some psychologists do. However, section 45 of the **Medical Act** states that: "Nothing in

this Act applies to … (m) the practice of psychology by a person who is licensed pursuant to the **Psychologists Act**." This provision ensures that psychologists, and other professionals listed in that section, are distinguished from those who are subject to the **Medical Act**. i.e., medical practitioners/physicians.

[59] Psychologists are regulated by a separate statutory regime which does not purport to hold them out as "physicians", or medical practitioners, or as doctors of medicine. To suggest that the **Rule 55.14** intends to capture their profession is not supportable.

[60] For all of the reasons set out above, I conclude that the report of the psychologist, Elizabeth Pace, does not fall within the exception found in **Rule 55.14**. She is not a treating "physician". The plaintiff will need to comply with **Rules 55.01 to 55.05** if it is intended to seek admission of an expert report from Ms. Pace.

[61] The plaintiff's motion is dismissed.

Issue 4: *What procedure will be followed at trial to determine the question of whether the plaintiff's claim for general damages falls within the minor injury threshold of section 113B of the* ***Insurance Act*** *("cap")?*

[62] S. 113B of the **Insurance Act**, R.S.N.S. 1989, c. 231 provides, in part, as follows:

> 113B (6) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, a judge, shall, on motion made before trial with the consent of the parties or in accordance with an order of a judge who conducts a pre-trial conference, determine for the purpose of subsection (4), whether as a result of the use or operation of the automobile, the injured person has suffered a minor injury.
>
> …
>
> 113B (8) Where no motion is made under subsection (6), the judge shall determine for the purpose of this Section whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury.

[63] By virtue of these sections, the legislature has made the question of whether the plaintiff suffered a "minor injury" a question of law. If the plaintiff has suffered a "minor injury", general damages are "capped" at $2,500.00 regardless of what a jury would otherwise award for general damages.

[64] The timing of the determination of the question of law as to whether the plaintiff has suffered a "minor injury" is a matter of judicial discretion.

[65] The defendant has requested that a determination be made whether the plaintiff has suffered a "minor injury" some months before convening the jury. The plaintiff has not consented.

[66] The defendant submits that if the cap issue is determined in advance of the trial before the jury then the case, if it proceeds, would be presented to the jury with the decision of whether or not general damages are capped at $2,500.00 already determined. The case can then be presented and the jury instructed within those parameters. This, the defendant says, has the benefit of simplifying an otherwise complicated procedure.

[67] The defendant also submits that the pre-trial judicial determination of whether the plaintiff has suffered a "minor injury" is analogous to the severing of the questions of liability and damages and that the same considerations apply. That is, in exercising its discretion the court must consider the effect of the decision on all of the parties, as well as its effect on the court system. e.g., *Rajkhowa v. Watson*, 2000 NSCA 50 at paragraphs 51 to 54. On this point I agree.

[68] The plaintiff maintains that the cap issue should be determined after hearing the evidence in the trial. This will avoid unnecessary duplication of the presentation of evidence, inconvenience to witnesses and additional expenses that the plaintiff would incur if the defendant's request is granted.

[69] One significant expense would be created if the plaintiff, who does not currently reside in Nova Scotia, is required to travel to Nova Scotia for two proceedings instead of the one trial set to commence on March 31.

[70] The defendant seems to believe that a prior determination of the question, which would necessarily require the calling of much of the same evidence that will be called on the trial, is advantageous, but the reason is not clear to me. If I am to

draw an inference that the matter is more likely to settle once the issue is concluded, I am not prepared to do so. There are a number of live issues which would still need to be tried, beyond general damages, so the suggested judicial economy is by no means assured. Neither do I see it impacting significantly in the way in which evidence will be adduced. It may impact on the content of the charge to the jury but the value of that must be weighed against the other negative consequences of an early resolution of the question.

[71] Section 34 of the **Judicature Act**, RSNS. 1989 c. 240 grants a party the right to choose a trial by judge and jury in a civil action such as this one. The function of a jury at trial is to make findings of fact and credibility. It is the trial judge's role to make determinations of law.

[72] In *Clark v. Zigrossi*, 2010 ONSC 5403, Brown, J. of the Ontario Superior Court of Justice canvassed the various judicial approaches that have been taken in Ontario as to the timing of the determination of an analogous "threshold" question of law found in s. 267.5(5) of the **Insurance Act** (Ontario) R.S.O. 1990, c. I.8. He cited the following observations by that province's Court of Appeal in *Kasap v. MacCallum* 2001 O.J. No. 1719 at paragraphs 7 and 8:

> 7 The Legislature has left it to Judges to determine whether the threshold has been met. This will often overlap a jury's considerations; and particularly where the symptoms are subjective.
>
> 8 Nowhere does the legislature say that the Judge is bound to consider the jury verdict much less that the Judge is bound by any implied finding of credibility of the jury. By the same token the legislation does not suggest that a Trial Judge cannot, in the exercise of judicial discretion, consider the verdict of the jury. The legislation is clear: the Judge must decide the threshold motion, and in doing so the Judge is not bound by the verdict of the jury. The timing of the hearing is in the discretion of the Judge.

[73] Following an exhaustive review of approaches taken by various judges to the exercise of the discretion, Brown J. succinctly identified the dilemma that faces the trial judge in determining a threshold issue such as the "cap" question. Simply put, if the threshold issue is decided before the evidence is heard by the jury the role of the trier of fact has been usurped in cases where, such as here, the plaintiff's injuries and their effects necessitate an evaluation of the credibility of the plaintiff. I agree with Brown J. when he writes at paragraph 15:

> [15] To decide a threshold motion before the jury returns with its verdict risks undermining the important role played by civil juries in this province. As judges we instruct jurors on their civic duty and exhort them to approach their jobs with diligence and care. To decide a threshold motion before the jury delivers its verdict strikes me as inconsistent with such an exhortation and as disrespectful of the place of juries in our civil trial system. Because, where the view the jury took of the plaintiff's credibility is manifest from their verdict, for a judge to reach a different conclusion on credibility without taking into account the verdict of the jury would seem to blur the line as to who really acts as the trier of fact in a jury case.

[74] I conclude that I am not prepared to determine the cap issue before the evidence is heard and considered by the jury. While I am not bound by the verdict of the jury I may well wish to consider manifest findings of fact in determination of the question of whether the plaintiff suffered a "minor injury".

Summary

[75] The plaintiff's motion to be permitted the right to cross-examine Dr. Edvin Koshi is granted.

[76] The plaintiff's motion to admit five letters authored by Dr. Neil Bower as treating physician narratives is dismissed.

[77] The plaintiff's motion to admit letters or reports from registered psychologist Elizabeth Pace as treating physician narratives is dismissed.

[78] The threshold question of law as to whether the plaintiff suffered a "minor injury" within the meaning of section 113B of the **Insurance Act** will be determined after the jury verdict.

Costs

[79] If the parties are unable to agree as to costs of the motions, I will receive their written submissions.

Duncan J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Russell v. Goswell*, 2013 NSSC 383

Date: 201312147
Docket: Tru No. 268149
Registry: Truro

Between:

Erika Russell

Plaintiff

v.

Michelle L. Goswell

Defendant

Revised Decision:	The text of the original decision has been corrected according to the appended Erratum dated December 17, 2013
Judge:	The Honourable Justice Patrick J. Duncan
Heard:	By correspondence
Counsel:	Janus Siebrits, for the Plaintiff Clarence A. Beckett, Q.C. and Jeremy P. Smith, for the Defendant

Erratum:

[1] Page 9, paragraph [24] of the decision reads:

> [24] In this case the defendant's objective is clearly a desire to tender a series of expert opinions provided by Dr. Bower, without having to meet the requirements for admission of his opinion in the form of an expert report....

It should read:

> [24] In this case the plaintiff's objective is clearly a desire to tender a series of expert opinions provided by Dr. Bower, without having to meet the requirements for admission of his opinion in the form of an expert report....