IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Parkland Construction Ltd.*, 2016 NSPC 4

Date: January 11, 2016
Docket: 2836007, 2836008, 2836009, 2360010 (Parkland) 2836012, 2836013 (Davison)
Registry: Halifax

Between:

Her Majesty the Queen

v.

Parkland Construction Limited

-and-

Daniel Davison

DECISION

Application for Production of Medical Records in the Possession of the Medical Examiner Service

Judge:	The Honourable Judge Anne S. Derrick
Heard:	January 8, 2016
Decision:	January 11, 2016
Charges:	Section 74(1)(a) of the *Occupational Health and Safety Act, R.S.N.S. 1996, C. 7* x 4 (Parkland) and section 74(1)(a) of the *Occupational Health and Safety Act, R.S.N.S. 1996, C. 7* x 2 (Davison)
Counsel:	Alex Keaveny, for the Crown
	Brad Proctor, for Parkland Construction
	Mark Tector, for Daniel Davison
	Agnes McNeil, for the Medical Examiner Service

By the Court:

Introduction

[1] On November 7, 2013, Allan Fraser, an employee of Parkland Construction Limited ("Parkland") fell to his death from the back of the 6th floor of a multi-unit apartment building that was under construction at 110 Greenpark Close in Halifax. There were no eye witnesses to his fall.

[2] Following a Department of Labour investigation, Parkland Construction Limited and one of its employees, Daniel Davison ("Davison"), were charged with offences under the *Occupational Health and Safety Act*. They have joined together in an application for production of third party records – medical records of Alan Fraser – in the possession of the Medical Examiner Service (MES). The Crown, which does not have these records either, has opposed the application as has the Medical Examiner. They cite the significant privacy rights that are vested in medical information.

[3] The MES notes that it is not authorized by the *Vital Statistics Act* - the legislation that obliges it to submit a medical certificate of death - to release medical records obtained in the course of its investigation into the fatality.

[4] There is no dispute amongst the parties that privacy rights attach to medical records. Privacy in relation to information is "based on the notion of the dignity and integrity of the individual." (*R. v. Dyment, [1988] S.C.J. No. 82, paragraph 22*) Medical records do not cease to be private upon death. (*See, for example, the Freedom of Information and Protection of Privacy Act, c. 5, S.N.S. 1993, section 43*)

[5] Parkland and Davison have brought their application under the *O'Connor*/*McNeil* third party records application regime and say the records are "likely relevant" to issues in their trials. They argue that they require the records in order to make full answer and defence to the charges against them. The Crown says they are engaged in a fishing expedition and have provided no basis for the records being "likely relevant."

[6] The onus in a third party records application rests with the applicant. Evidence in the form of Affidavits has been filed by Parkland and Davison and the

Crown. That evidence, and an email dated January 7, 2016 from counsel for the Medical Examiner to Crown counsel, has come in by consent and no witnesses were called on the application. None of this evidence is agreed to or proven for the purposes of the trial itself.

Basic Facts Alleged

[7] Alan Fraser worked for Parkland at the Greenpark Close worksite as a labourer. On November 7, 2013 he was working on the 6th floor of the building with another Parkland employee, Allan Roy. He and Mr. Roy were cleaning up construction debris using a wheelbarrow and a shovel. They were dumping the debris off the 6th floor at the front of the building. (*Affidavit of Ainsley Downey, paragraphs 5 and 6*)

[8] On two occasions while they were on the 6th floor together during the morning of November 7, Ainsley Downey told Mr. Fraser not to go near the edge of the building. (*Affidavit of Paula Dobson, Tab J, Statement of Ainsley Downey to the Department of Labour*)

[9] No one was on the 6th floor of the building when Mr. Fraser fell. Photographs taken by police of the scene show a wheelbarrow on its side with a shovel and a broom and Mr. Fraser's hard hat, all close to the edge of the building. (*Affidavit of Paula Dobson, Tab A, Photos 011 - 015*)

The Charges against Parkland Construction Limited and Daniel Davison

[10] An Information sworn on February 17, 2015 charged Parkland with four offences under section 74(1)(a) of the *Occupational Health and Safety Act*:

- Failure, as an employer, to require workers to use fall protection when the workers were at risk from falling from a work area where the fall distance was three meters or more above the nearest safe surface… contrary to section 21.2(1) of the *Workplace Health and Safety Regulations*;
- Failure, as an employer, to establish a specific written fall-protection safe-work plan for a specific work area [where] fall protection is required and the fall distance is 7.5 meters or more, contrary to section 21.4(1) of the *Workplace Health and Safety Regulations*;

- Failure, as an employer, to ensure that a person takes and successfully completes training on fall protection before they work in…a work area where fall protection is required, contrary to section 21.19(1)(ii) of the *Workplace Health and Safety Regulations*;
- Failure, as an employer, to ensure that a chute or other safe method that provides an equivalent degree of protection is used where rubbish or debris is lowered more than 6 meters vertically, contrary to section 27(2) of the *Occupational Safety General Regulations*.

[11] Parkland has pleaded not guilty and has trial dates set for April 27 – 29 and May 2 – 5, 2016 before me.

[12] Daniel Davison, an employee of Parkland who is alleged by the Crown to have been a supervisor at the Greenpark Close worksite has been charged separately from Parkland in relation to Mr. Fraser's death. His trial is scheduled for May 16 – 20, 2016 before a different judge.

[13] Davison has been charged with two violations of section 74(1)(a) of the *Occupational Health and Safety Act*:

- Failure, as an employee to take every reasonable precaution in the circumstances to protect the employee's own health and safety and that of other persons at or near the workplace, contrary to section 17(1)(a) of the *Occupational Health and Safety Act*;
- Failure, as a supervisor, to require workers to use fall protection when the workers were at risk of falling from a work area where the fall distance was three meters of more above the nearest safe surface…,contrary to section 21.2(1) of the *Workplace Health and Safety Regulations*.

The Context for the Third Party Records Application

[14] The Medical Examiner who conducted an autopsy of Mr. Fraser prepared a Certificate of Death ("Death Certificate") and a Post Mortem Report ("Post Mortem"). The Death Certificate indicated "Cause of Death" as "Blunt injuries of Head, Chest, Abdomen, and Pelvis" and "Manner of Death" as "Accident." (*Affidavit of Jim Kanellakos filed by Parkland, Tab C*)

[15] When Mr. Keaveny provided Parkland and Davison with disclosure of the Post Mortem Report from the autopsy, he indicated that the Medical Examiner had medical records for Mr. Fraser in its possession but would not release them. (*Affidavit of Jim Kanellakos, Tab E, Email from Alex Keaveny dated August 25, 2015)*

[16] On December 4, 2015, in accordance with the procedure established by *R. v. O'Connor*, [1995] S.C.J. No. 98, paragraph 20 and *R. v. McNeil*, [2009] S.C.J. No. 3, paragraph 27, Parkland served a *subpoena duces tecum* on the Medical Examiner Service requiring a representative of the MES to attend the hearing of a third party disclosure application scheduled for January 8, 2016. The *subpoena duces tecum* directed the MES representative to "bring with them and to produce at the hearing…Any and all medical records in the file of the Medical Examiner Service relating to Mr. Alan Fraser." The MES representative was in attendance at the January 8 hearing of this application.

[17] Davison has joined in Parkland's application and is also seeking production of Mr. Fraser's medical records in the MES' possession. Davison has agreed to be bound by my determination of the third party records issue and will not be separately litigating the issue.

The Basis for the Third Party Records Application

[18] Parkland and Davison submit that Alan Fraser's medical records in the possession of the MES are "likely relevant" to the following issues:

- Whether the area from which Mr. Fraser fell was part of a work area where fall protection is required; and
- Whether Mr. Fraser had mental health issues which might have led him to falling.

[19] As noted earlier in these reasons, Parkland is charged with having violated various provisions of the *Workplace Health and Safety Regulations* ("WHSR") relating to fall protection. Parkland submits that the issues the court will have to determine in relation to the three WHSR charges are:

- What constituted Mr. Fraser's "work area" on November 7, 2013;
- Whether Mr. Fraser was at risk from falling from that work area; and

- Whether, having determined these first two issues, fall protection, a fall protection safe-work plan and fall protection training were required.

[20] The first two issues and the issue of whether fall protection was required will have to be determined in Mr. Davison's trial also.

[21] As noted by Parkland, "work area" is defined in the WHSR as: "a location at a workplace where an employee…is working or may be required to work." (*section 1.2, WHSR*)

[22] In the submission of Parkland and supported by Davison, the medical records may contain information that Mr. Fraser was suicidal. Parkland has further stated in its rebuttal brief that "it is requesting any and all records relating to any condition with which Mr. Fraser was afflicted that may explain why he was near the edge of the back of the building, which was not his "work area". Such conditions could include conditions of a psychiatric, psychological and/or physical nature (i.e. suicidal ideation, disorientation, dizziness, etc.)" (*Rebuttal Brief, page 2*)

[23] Similarly Davison in his rebuttal brief states: "…what the Medical Records could show is that there is a medical reason why Mr. Fraser may have been in an area outside of his designated work area. There are many medical reasons for this, such as confusion, dizziness, suicidal ideation, etc."

[24] Parkland has also submitted that it may want to have an expert review the records in advance of its trial.

[25] Each of Parkland and Davison make the additional argument that what was in the hands of the Medical Examiner when he determined "manner of death" should be produced to them. Parkland and Davison note that the only information they have not been provided from the Medical Examiner's file are the medical records he reviewed.

[26] Parkland submits that it is entitled to "view the medical records that were before the Medical Examiner when it reached its conclusion on cause and manner of death…" and that without access to the medical records its ability to make full answer and defence is impaired. (*Parkland Rebuttal Brief, page 4*)

[27] Davison submits that "there may be relevant information in the Medical Records which led the Medical Examiner to somehow conclude that the manner of death was by "accident." Davison states: "Neither the Crown nor counsel for the ME have identified how or why the determination of "accident" was made." (*Davison Rebuttal Brief, page 2*)

A Clarification of the Issue of When the Medical Examiner had the Medical Records

[28] An email from Agnes McNeil, counsel for the Medical Examiner, to Mr. Keaveny, clarified when the Medical Examiner had Alan Fraser's medical records: after he had certified death but before he prepared the Post Mortem Report. (*Exhibit 6, email from Agnes McNeil to Alex Keaveny dated January 7, 2016*) In her submissions on behalf of the Medical Examiner, Ms. McNeil indicated that the Medical Examiner could have changed the Death Certificate upon review of the medical records but did not do so. The email, which she wrote after speaking with the Medical Examiner to clarify the point states: "In any event he has looked at them again and they do not change his opinion."

The Issue of What Constituted Alan Fraser's "Work Area" on November 7

[29] As I understand the Parkland/Davison submissions, the connection to be made between the issue of Alan Fraser's "work area" on November 7 and the medical records in the possession of the Medical Examiner is this: if the area on the 6th floor from which Alan Fraser fell – the area at the rear of the building – was not an area where he had been working or had been directed to work, then the charges against Parkland and Davison relating to the WHSR fail. I believe the argument effectively contemplates that the medical records may shed some light on what Mr. Fraser was doing at the back of the 6th floor; that he may have gone there in a confused, dizzy or suicidal state. I will address this shortly, after I review the evidence before me on this application that relates to the "work area" issue.

[30] According to Ainsley Downey's Affidavit, "There was only one designated site" for debris dumping from the 6th floor. Mr. Downey observed Mr. Fraser and Mr. Roy dumping at the designated site approximately 10 times during the morning of November 7. (*Affidavit of Ainsley Downey, paragraph 8*) In his September 2, 2014 interview with a Department of Labour investigator, Allan Roy

recalled there being more than one dumping area from the 6th floor, including at the back of the building. (*Affidavit of Paula Dobson, Tab K, Interview of Allan Roy, pages 14* and *17*)

[31] In his September 2, 2014 interview Mr. Roy was asked whether there was "any reason" he could think of to explain why Mr. Fraser would have been at the back of the building. Mr. Roy, who had left the worksite before Mr. Fraser fell, responded:

> Yeah, like we started – I think that would have been it, you know, should have been – if he, you know, the only reason for him to be there was if that's the next dump site, really. (*Affidavit of Paula Dobson, Tab K, Interview of Allan Roy, page 17*)

[32] Mr. Roy said he had never heard the term "designated dump site" that he could recall. (*Affidavit of Paula Dobson, Tab K, Interview of Allan Roy, page 27*)

[33] Allan Roy had previously given a statement to Parkland's lawyer on November 27, 2013. In that statement he referred to there being a single designated dumping site on the 6th floor of the building:

> We were told to dump the wheelbarrow at the designated dumping site near the front of the building...That was the only place on the 6th floor you could dump from and there was no other place to dump on the 6th floor. You could not dump from the back of the building onto the podium because there was a crew of employees back there cleaning the podium…There was no reason for us to be dumping near the back of the building…(*Affidavit of Paula Dobson, Tab O, Allan Roy's Statement to Parkland*)

[34] When Mr. Roy was asked on September 2, 2014 about his earlier statement to Parkland and his recollection then that there had been no dumping off the back of the building, he said he would "have had a very much clearer memory" at the time of the November 27, 2013 statement. He stated he recalled they had dumped off the back of the building previously but could not "honestly remember if we did that day or not." *(Affidavit of Paula Dobson, Tab K, Interview with Allan Roy, page 28)*

[35] Derrick Farrell gave a statement to Parkland on November 27, 2013. His duties on November 7 included cleaning the ground-level podium at the rear of the

building. He did not see Mr. Fraser fall but witnessed the impact from approximately 20 feet away. In his Parkland statement, Mr. Farrell said: "We had been cleaning the podium that day and for a couple of days previous, and at no point during that time had anyone dumped anything from any floor above onto the podium." (*Affidavit of Paula Dobson, Tab P, Statement of Derrick Farrell to Parkland)*

The Issue of Why Alan Fraser Was in the Rear Area of the Sixth Floor on November 7

[36] Mr. Roy did not notice anything unusual on November 7 about Mr. Fraser's demeanor or attitude: "He seemed pretty happy…nothing about him struck me as, you know, that he had a death wish or anything like that." (*Affidavit of Paula Dobson, Tab K, Interview with Allan Roy, page 26*) While Mr. Roy described himself as having been somewhat preoccupied with his own issues on November 7, he told the Department of Labour investigator that, as far as Alan Fraser having a "death wish", he, "didn't pick up on or catch any of those vibes that day" and "hadn't gotten them off him before." (*Affidavit of Paula Dobson, Tab K, Interview with Allan Roy, page 27*)

[37] The evidence on this application indicates that Mr. Fraser's co-workers had observed him express a cavalier attitude toward his safety prior to November 7. This led to some co-workers thinking that "he was not necessarily concerned about his own safety." (*Affidavit of Paula Dobson, Tab M, Statement of Dan Hanson to Parkland, page 2)* Various people believed he was depressed. (*Affidavit of Paula Dobson, Tab F, Interview with Peggy Ferguson, pages 51 and 53; Affidavit of Paula Dobson, Tab L, Interview with Derrick Farrell, page 9)* After Mr. Fraser fell, some co-workers formed the view that he had committed suicide. He had previously talked to Dan Hanson about some personal issues. (*Affidavit of Paula Dobson, Tab M, Statement of Dan Hanson to Parkland, page 2)*

[38] In a text message exchange with a co-worker on November 7 after Mr. Fraser's fatal fall, Mr. Hanson was asked if he knew how it happened. He responded: "So far he fell. But do you remember how he talked about that suicide shit, about not caring about dying and such?" (*Affidavit of Paula Dobson, Tab M, Statement of Dan Hanson to Parkland, page 3*)

[39] Although Mr. Hanson stated in an Affidavit dated December 3. 2015 that Mr. Fraser had "mentioned…a couple of times that he was thinking of suicide", he responded with the following on November 8, 2013 when asked by a Department of Labour investigator exactly what Mr. Fraser had said:

> …He was just like, 'I, I don't care. I'm not, I'm not afraid of dying.' But it wasn't in, it wasn't in that kind of context. It was more of a like, 'I don't care." You know what I mean? It was just the way he, he talked. It – I can't say, even say it was the way he talked. It was just a random thing that he said…" (*Affidavit of Paula Dobson, Tab I, Statement by Dan Hanson, page 11*)

[40] Mr. Hanson explained that Mr. Fraser had made these statements when they were working together and he was close to the edge of the building and was being warned to be careful. In Mr. Hanson's interview he said: "…like everyone tells everybody, like, 'Watch out.' You know what I mean? 'Don't go near the edge.' And he was like, 'Oh, I don't care.' (*Affidavit of Paula Dobson, Tab I, Statement by Dan Hanson, page 11*) According to Mr. Hanson it was probably three weeks prior to November 7 since Mr. Fraser had last said anything of this nature. (*Affidavit of Paula Dobson, Tab I, Statement by Dan Hanson, page 10*)

[41] Mr. Fraser was not impaired by drugs or alcohol when he fell. Toxicological testing of Mr. Fraser's blood and urine produced no positive findings for controlled substances or alcohol. (*Affidavit of Jim Kanellakos, Tab G*) Alan Fraser's mother, interviewed by a Department of Labour investigator on December 3, 2014, reported that he did not have a history of mental illness "with the exception of taking 1 – 2 pills (Ativan) 3 – 4 years ago for anxiety." (*Affidavit of Jim Kanellakos, Tab E*) Mr. Fraser was 21 when he died. Therefore he would have taken the Ativan in his late teens.

[42] Parkland submits in support of its application that the decision by Department of Labour investigators to inquire into the status of Mr. Fraser's mental health demonstrates the relevance of his medical records. In Parkland's submission, Mr. Fraser's mother is not a reliable source for information about her son's mental health and the investigators should have probed further.

Third Party Records – The "Likely Relevant" Stage

[43] The Supreme Court of Canada most recently set out the procedure for a third party records *O'Connor* application in *R. v. McNeil*, [2009] S.C.J. No. 3. *McNeil* reiterated the two-stage test established in *O'Connor*. Production of non-privileged records in the possession of a third party may be ordered by the judge for the court's inspection if, at the first stage, the judge is satisfied that the records are "likely relevant" to the proceeding against the accused. The second stage involves the judge "with the records in hand" determining "whether, and to what extent, production should be ordered to the accused." (*McNeil, paragraph 27*) Privacy considerations are not a factor at the first stage; the only issue is whether the records are likely to be relevant. (*O'Connor, paragraph 24*)

[44] As explained in *McNeil*, the judge considering an *O'Connor/McNeil* third party records application acts as a gatekeeper:

> …We have already seen that the presumptive duty on Crown counsel to disclose the fruits of the investigation in their possession under *Stinchcombe* is premised on the assumptions that the information is relevant and that it will likely comprise the case against the accused. No such assumptions can be made in respect of documents in the hands of a third party who is a stranger to the litigation. The applicant must therefore justify to the court the use of state power to compel their production - hence the initial onus on the person seeking production to show "likely relevance". In addition, it is important for the effective administration of justice that criminal trials remain focused on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function. (*paragraph 28*)

[45] The likely relevance threshold is "a significant burden", but not an onerous one. Defendants are not required to demonstrate the specific use to which they might put the information being sought, information they have not seen. However, the court is expected to play "a meaningful role" in screening applications to prevent "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production." (*McNeil, paragraph 29*)

[46] "Likely relevance" in the *O'Connor/McNeil* context as it relates to the Parkland and Davison application means that there is "a reasonable possibility that the information is logically probative to an issue at trial…" (*McNeil, paragraph*

33; O'Connor, paragraph 22) This is a more stringent test than is applied in the *Stinchcombe* disclosure context where relevance is established on the basis of whether the information may be useful to the defence. Relevance to "an issue at trial" refers to evidence that may be probative to the unfolding of events, evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. (*O'Connor, paragraph 22*) "Likely or probable relevance refers to a relationship, based on logic and common sense, between the information sought and an issue in the proceedings." (*R. v. Bradey, [2015] O.J. No. 5713, paragraph 101 (C.A.)*) There is no right to irrelevant evidence and defendants are "not permitted to distort the truth-seeking function of the trial process." (*R. v. Mills, [1999] S.C.J. No. 68, paragraph 74*)

Analysis – The "Likely Relevance" of the Medical Records in the Possession of the Medical Examiner Service

[47] As with all such applications, neither the Crown nor the defendants nor the court knows what is contained in the medical records held in the MES' file. Parkland and Davison have said they are likely to be relevant to issues that will be in dispute at trial: was Mr. Fraser in his work area when he fell on November 7? And if he was, was he at risk of falling from that area? Parkland and Davison want to find out if Mr. Fraser may have fallen because he was suicidal or had a physical condition that made him dizzy, disoriented or confused.

[48] Parkland and Davison say that the evidence on this application establishes that the medical records in the MES' file are likely relevant to trial issues relating to the unfolding of events, evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. They submit the evidence suggests Mr. Fraser was self-destructive, depressed, and indifferent to his own safety. In their submission these conditions, or possibly physical conditions such as dizziness, confusion or disorientation, could explain why Mr. Fraser would have migrated to the back of the building where he fell. It is the argument of Parkland and Davison that information about such conditions is probative of where Mr. Fraser's work area was and whether he was at risk of falling from that area.

[49] The evidence I am to consider on this application indicates that Mr. Fraser and Mr. Roy were dumping construction debris off the 6th floor at the front of the building. After Mr. Fraser fell from the back of the building, the tools he had been

using – a broom, shovel, and wheelbarrow - were located with his hard hat near the edge that he fell from. The wheelbarrow was tipped over, its contents spilled. How Mr. Fraser came to fall is not known. But there is no evidence that he fell because he was suicidal.

[50] Mr. Fraser's co-workers had noticed that, at times, he shrugged off warnings about safety on the site. There is no evidence that he ever talked about killing himself. Opinions that he was depressed prior to his death were impressionistic: Mr. Fraser was not observed to be depressed on November 7. More carefully examined, the evidence of Dan Hanson that Mr. Fraser had talked about suicide discloses no evidence of Mr. Fraser mentioning suicide. Mr. Hanson's November 8, 2013 statement to the Department of Labour indicates that Mr. Hanson inferred suicidal ideation from Mr. Fraser being cavalier on occasion about safety.

[51] The disclosure by Mr. Fraser's mother than he had taken Ativan a few years earlier for anxiety also does nothing to establish that the medical records in the MES' file are "likely relevant" to the issues at trial. The fact that Mr. Fraser took 1 – 2 Ativan pills some time before November 7, 2013 is no indication that he had any mental health issues that would have contributed to his falling from the 6th floor at Greenpark Close. The specific nature of his mother's recall – the nature of the medication, how much Mr. Fraser took and the reason he took it – suggests she was well aware of her son's mental health status.

[52] There is no evidence that Mr. Fraser experienced disorientation, confusion or dizziness at the worksite on or before November 7, 2013. The suggestion by Parkland and Davison that the medical records in the possession of the MES might contain information about such conditions is pure speculation.

[53] Not only were there no positive results from the toxicological screening of Mr. Fraser's blood and urine, the post mortem examination found no pre-existing abnormalities in Mr. Fraser's brain or his heart.

[54] No evidence has been produced for this application to support the submission that the medical records in the MES' file are "likely relevant" to issues at trial. Parkland and Davison have not discharged the burden that rests on them to establish "likely relevance". As the Crown submitted, the ability to articulate what the applicants hope to find in the records does not satisfy the requirement of

establishing that the records are likely to be relevant. Case specific evidence is needed: it is not enough to suggest that there may be something useful to be found.

[55] This takes me to the point made by Parkland and Davison that the medical records are the only MES file materials they have not been provided. The MES file materials were provided to them in accordance with the *Stinchcombe* obligations of the Crown to disclose what may be useful to the defendants' full answer and defence. The Crown requested the Post Mortem Report from the MES and once it was received, forwarded it to the defendants. (*Affidavit of Jim Kanellakos, Tab K, email from Alex Keaveny*) The medical records have never been obtained by the Crown and consequently do not form part of the Crown's case.

[56] It is not a compelling argument for production that the defendants have everything from the MES' file but Mr. Fraser's medical records. The "likely relevance" standard still applies notwithstanding the disclosure to the defendants by the Crown of the rest of the MES' file. The fact that the Medical Examiner chose to review the records is not the test for production. "Likely relevance" has to be established. I further note that the MES certified the manner of Mr. Fraser's death as "accident" and did not change this assessment after perusing the medical records.

[57] The medical records in the MES' file will not assist in the determinations that will have to be made of what constituted Mr. Fraser's work area and whether he was at risk of falling from his work area. Where he was working on November 7 or where he was required to work will not be determined on the basis of anything that might be contained in the medical records. To satisfy "likely relevance" the medical records would have to be probative of the work area and risk of falling issues. Parkland and Davison have failed to establish a probative link between the records and those issues. Their application for production of Mr. Fraser's medical records in the MES' file is dismissed.