IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Tingley v. Wellington Insurance, 2008 NSSC 317

Date: 2008/10/09
Docket: S.H. No. 115328
Registry: Halifax

Between:

Patricia Tingley, Margaret Burton, Kelli Smith and Todd Smith

Plaintiffs

v.

Wellington Insurance and Larry Hay

Defendants

Judge:	The Honourable Justice A. David MacAdam
Heard:	October 9, 2008, in Halifax, Nova Scotia
Oral Decision:	October 9, 2008
Written Decision:	October 30, 2008
Counsel:	Kevin A. MacDonald, for the Plaintiff Jocelyn Campell, Q,C. and Harry Turlow, for the Defendants

By the Court:

[1] **Introduction** This is an application by the plaintiffs for the admission into evidence of file materials of certain physicians who treated or consulted with the plaintiffs. The plaintiffs seek the admission of the physicians file materials and reports without the necessity of having the physicians attend at trial to testify. The physicians concerned are Dr. William Deagle, Dr. Bruce Elliott, Dr. Nigel Allison, Dr. Raezell Zinman, Dr. Joseph Lawen and Dr. Jonathan Fox.

[2] **The witnesses** The plaintiff Ms. Tingley discusses the grounds for the application in her affidavit. She, and her Counsel, say, and I paraphrase:

> (1) Dr. William Deagle, who resides in California, is willing to attend at trial if the plaintiffs pay for his travel and accommodation costs. Ms. Tingley says she has incurred significant costs in preparing for and attending trial, and claims to have limited resources. She says she is "not in a position" to incur the expense of bringing Dr. Deagle from California for the anticipated two to four days that his evidence would require. Counsel submits that the appropriateness of the course of treatment pursued by Dr. Deagle could be addressed by other medical witnesses. He also submits that, although the defendants challenge Dr. Deagle's credibility based on certain personal beliefs he allegedly holds (and which he apparently widely promotes), when he treated the plaintiffs his medical license was in good standing. As Dr. Deagle was a family physician, counsel submits, his file materials can be admitted through the plaintiffs' successor family physicians. Finally, counsel submits, the defendants can call Dr. Deagle themselves if they wish to cross-examine him.
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> (2) Dr. Raezell Zinman now resides in Philadelphia. Ms. Tingley does not know whether Dr. Zinman is willing to attend at trial. However, she says that in any event she "is not in a position to afford to bring Dr. Zinman from Philadelphia for the purpose of giving evidence." Counsel submits that Dr. Zinman saw the plaintiff

> Todd Smith in the respirology clinic of the IWK Hospital, and says her records should be admitted as part of the IWK records that were admitted by consent. In any event, he says, the defendants can call her at trial if they want to cross-examine her.
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> (3) Dr. Joseph Lawen, who resides and practices in Nova Scotia, proposes to charge $3,500.00 to give evidence for half a day. Ms. Tingley says this is beyond her means.
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> (4) According to counsel for the plaintiff, Dr. Jonathan Fox wrote three letters that are included in the file materials of Dr. Hilda Fox, and should be admissible through her testimony. However, counsel says there is no concern with the expense of Dr. Jonathan Fox's testimony, and he could be called to confirm those letters.
>
> (5) and (6) Drs. Bruce Elliott and Nigel Allison are both deceased. Dr. Elliott was a family physician. The plaintiffs submit that his file materials would have been forwarded to his successors, and should be admissible through the present family physicians of the plaintiffs. Counsel notes that the defendants have used Dr. Elliott's chart notes in cross-examination of Ms. Tingley. Counsel also states that, while Ms. Tingley did take issue with certain items in Dr. Elliott's file on discovery, these alleged errors only related to his recitation of the facts of what had occurred to Ms. Tingley and her family in September 1991, not his medical conclusions.

[3] The defendants submit that the expense associated with the expert witnesses' attendance at trial does not permit the court to relieve the plaintiffs of the requirement to have the witnesses attend for cross-examination.

[4] The defendants add that the plaintiffs have submitted no evidence of their financial circumstances. They allege that, according to evidence adduced on an application for adjournment costs on November 13, 2007, the plaintiffs had nearly $60,000.00 set aside for the litigation. They also allege that the plaintiff Kelli Smith settled a motor vehicle accident claim for $40,000.00 in January 2008.

[5] **Hearsay and business records** The plaintiffs rely on *Ares v. Venner*, [1970] S.C.R. 608, which is the leading case on the admission of medical records as business records, as an exception to the hearsay rule. The court in *Ares* said, at 626:

> 26 Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record, should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in Court and available to be called as witnesses if the respondent had so wished.

[6] The applicant cites *Cavanaugh v. MacQuarrie* (1979), 35 N.S.R. (2d) 687 (S.C.T.D.), where Richard J. considered the admissibility of a patient's charts:

> 22 The question of the evidentiary value of patient's charts as exceptions to the hearsay rule was canvassed at some length in the Supreme Court of Canada case *Ares v. Venner*.... When the matter finally reached the Supreme Court of Canada, the main issue was the admissibility of the nurses' notes who had attended on the plaintiff in hospital. The judgment of the Supreme Court of Canada was delivered by Hall J., who said at p. 16 [D.L.R.]:
>
> > Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so.
>
> 23 On the basis of *Ares v. Venner*, *supra*, the notation contained on the medical records with respect to the blood alcohol level of the plaintiff can be accepted as

> *prima facie* proof of the fact stated, i.e., that at the time of his admission to the Victoria General Hospital, the plaintiff had a blood alcohol reading of 228mg/100ml.

Richard J. added that the evidence was not sufficient to raise a reasonable doubt as to the accuracy of the sample (para. 24).

[7] Subsection 23(2) of the *Evidence Act*, R.S.N.S. 1989, c. 154 provides:

> Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

[8] Subsection 23(4) deals with the weight of such evidence. It provides:

> The circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this Section, but such circumstances do not affect its admissibility.

[9] In *R. v. Wilcox* (2001), 192 N.S.R. (2d) 159 (C.A.), the Court of Appeal restated the common law rule on business records:

> 49 ... All respondents accept *R. v. Monkhouse* (1987), [1988] 1 W.W.R. 725 (Alta. C.A.) as an accurate statement of the requirements for such admissibility. The following passage from the judgment of Laycraft, C.J.A., for the Court at p.732 sets out the applicable principles:
>
> > In his useful book, *Documentary Evidence in Canada* (Carswell Co., 1984), Mr. J.D. Ewart summarizes the common law rule after the decision in *Ares v. Venner* as follows at p. 54:

> ...the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after Ares does reflect a more modern, realistic approach for the common law to take towards business duty records.
>
> To this summary, I would respectfully make one modification. The "original entry" need not have been made personally by a recorder with knowledge of the thing recorded. On the authority of *Omand*, *Ashdown*, and *Moxley*, it is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records. ...

[10] Concluding that the proposed evidence could not be admitted under the common law rule, because the recorder was under no duty to make the record, the Court went on to consider whether it was admissible by statute (in this case, the *Canada Evidence Act*, R.S.C. 1985, c. C-5). Admissibility under the statute being "seriously debatable," it was preferable to apply the principled approach to the admission of hearsay (para. 58). (See paras. 59-76).

[11] I am satisfied that the doctors were under a duty to record, not only their findings, but any statements by the plaintiffs, their observations of their condition

and any circumstances they recited concerning their condition and how it may have occurred. Having recorded the plaintiff's various statements, including their version of statements made to them by other physicians and persons with whom they had related, it was for the doctor, in preparing his opinion to assess the weight and reliance he/she placed on these statements.

[12] If, in the present circumstance, it might be argued that the doctor was not under a duty to record statements by the plaintiffs, then certainly the recording of such statements would be within the *Nova Scotia Evidence Act*.

[13] I am satisfied the apparently contrary view in *Casford v. Bass*, (2005), 193 Man. R. (2d) 233 (Q.B.) to the effect that the doctor's notes were not business records as they were not "a record of an act, transaction, occurrence or event," as they did not quote the actual words of the patient, (para. 31) is not applicable here.

[14] After referencing these observations, Mewett and Sankoff, in *Witnesses*, at p. 22 - 37, continue:

> ... Although it is difficult to accept the legal premise of this particular finding, as there is no reason why an event must be transcribed precisely and in its entirety to qualify as a business record, the decision to exclude the notation seems sound enough in the circumstances. As the trial judge pointed out, there was no evidence guaranteeing that the record was made within the ordinary course of business, and the reliability of the record, given its sketchy and inconclusive nature, was somewhat suspect.

[15] **Experts' reports** Civil Procedure Rule 31 sets out the requirements for service and filing of experts' reports. Rule 31.08(4) provides that "the expert shall be required to attend at the trial unless the person receiving the report gives notice that he does not require the attendance of the expert at the trial." The essential issue on this application is whether the reports of these physicians can be admitted into evidence without the *viva voce* testimony of the physicians themselves.

[16] The defendants submit that Rule 31, as interpreted, provides them with the right to cross-examine the expert physicians on their reports. They submit, correctly in my view, that the ability to cross-examine is integral and essential to the court's ability to adequately assess an expert's opinion. They cite *Goode v. Oursen* (1991), 105 (2d) 386; *Greenwood Shopping Plaza v. Neil J. Buchanan Ltd. et al.* (1979), 31 N.S.R. (2d) 135; *Horne v. Industrial Estates Ltd.* (1996), 152 N.S.R. (2d) 380 (S.C.); and *The Ikarian Reefer*, [1993] 2 lloyd's Rep. 68 (Q.B.) on this point. In *The Ikarian Reefer* Creswell J. said:

> The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation....
>
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.... An expert witness in the High Court should never assume the role of an advocate.
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> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion....
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise....

[17] There is authority for the proposition that where the maker of an opinion is deceased, the factual aspects of the report may be admitted in the manner of a business record, but the opinion aspect of the report is inadmissible: see *R. v. McGuire* (1985), 81 Cr. App. R. 323 (C.A.); M.N. Howard et al., *Phipson on Evidence*, 14th edn. (London 1990), 32-09.

[18] On the other hand, in *Colley v. Travellers Insurance Co.* (1998) N.S.R. (2d) 176, Davison J. admitted the written opinions of a deceased psychiatrist on the basis of necessity and reliability, on condition another psychiatrist from whom the plaintiff received an opinion testified at trial. Justice Davison noted the defence

would be faced with the opinion expressed by the deceased psychiatrist as "they relate to the main issue" in the proceeding. Counsel would not have an opportunity to cross-examine. He observed that it would be reasonable to expect if the doctor had been able to testify he would be expressing the opinion that he had advanced in his reports. At para 16, Justice Davison continued:

> That opinion could change in cross-examination if counsel directed facts which were not available to Dr. Moore when he ventured his opinion or for other unknown reasons.

[19] He permitted the reports to be filed on condition another psychiatrist who had examined the plaintiff testified, and was available for cross-examination, including as to any opinion he may have on the reliability of the deceased's psychiatrists opinions.

[20] In considering the question of whether a record may contain opinion, the authors of *Witnesses* refer to *R. v. West* (2001), 45 C.R. (5th) 307; 2001 CarswellOnt 2960 (Ont. S.C.J.), where the court took the view that "there was no compelling reason to preclude the use of opinions made during the declarant's normal scope of duty" (*Witnesses*, p. 22-36). The court went on to state:

> 63 There is of course a continuum of subjective opinonism with observations positioned at one end and conclusions clearly steeped in expert skills at the other. In some instances, observations of the expert declarant, while informed by a measure of special knowledge or expertise, are arguably little more than the expression of opinion permitted by a lay witness.... On the other hand, some opinion statements are almost wholly the product of application of specialized skill and experience as in the hard science of forensic pathology.... In my view, there is no longer a compelling case for adherence to the shopbook vestige of the traditional exceptions. The conclusion of the authors in *The Law of Evidence in Canada*, *supra* at page 218, § 6.137, is correct:
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> > Accordingly, the exception now appears to include recorded opinions, so long as they fall within the declarant's normal scope of duty.
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> 64 It may be that, in a given case, the novelty of the science at issue, the high degree of subjectivism as in psychiatric assessment, or the centrality of the hearsay opinion to the ultimate issue in the proceeding, will attract application of the court's residual discretion to exclude evidence whose prejudicial effect outstrips its probative value....

[21] The authors of *Witnesses* suggest that this approach "has a great deal to commend it" (p. 22-36). They go on to cite *Egli (Committee of) v. Egli* (2003), 40 C.P.C. (5th) 129; 2003 CarswellBC 2782 (B.C.S.C.), where the issue involved the admissibility of hospital records that included opinions and preliminary diagnoses relating to the defendant's father, whose competence at the time of certain transactions was in issue. The court refused to admit the records, relying on *West*. Garson J. held, at para. 15:

> [A]lthough the science used to formulate the opinions is not novel, there is arguably a high degree of subjectivity involved in assessing a person's mental competence. Also, the opinions in the PMHC records are central to the ultimate issue in this proceeding. Furthermore, although the expertise of the record keeper was not enumerated as a factor in the West case, it would seem that there is at least an issue as to the expertise and qualifications of the record keepers in the PMHC records. The absence of evidence as to the qualifications of the record keeper may increase the prejudicial effect of the opinions.

[22] The court added that the opinions would be accorded little weight if they were admitted, given the lack of description in some diagnoses and the lack of evidence as to the authors' qualifications (paras. 19-22).

[23] Here the opinions involve a large degree of subjectivity and are central to the ultimate issue. They are also challenged not only as to the opinions but as to the accuracy of the information relied on by the doctors, as appears from their reports, as well as their notes and charts, outlining the information that they were provided, and presumably may have considered in formulating their opinions. The challenge to the accuracy of the information they recorded is made by one of the plaintiffs during her testimony at trial. Without knowing the doctors positions on the notes and records they created, and whether, and, if so, to what extent they relied on what may have been inaccurate information, or at least misunderstandings, it can be said the "prejudicial effect may outstrip the probative value."

[24] It is not clear that in *Colley v. Travellers Insurance Co., supra*, the issue of reliability was similarly in question.

[25] The relationship between expert's opinions and facts admissible as business records was considered in *Seaman v. Crook*, 2003 BCSC 464; 2003 CarswellBC 695. In that case, Metzger J. considered whether the British Columbia *Evidence Act* business records exception allowed the admission of a doctor's opinion for the truth of the opinion without further proof. Assessing the import of *Ares v. Venner* and a number of cases following it, and the statute, Metzger J. said:

> 14 The cases ... and s. 42(2) which provides:
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> > In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if...
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> when taken together, stand for the following:
>
> > (1) That the observations by the doctor are facts and admissible as such without further proof thereof.
> >
> > (2) That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof.
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> > (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth.
> >
> > (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth.

> (5) That the diagnoses made by a person to whom the doctor had referred the patient are admissible for the fact that they were made but not for their truth.
>
> (6) That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the clinical records as this is a judge alone trial.
>
> 15 Therefore any, and I emphasize the word "any", opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.

[26] In addition to requesting that the court decline to admit into evidence the reports or opinions of experts who are not called as witnesses, the defendants request that where experts who do attend have relied upon the reports or opinions of experts who do not attend at trial, any portions of their reports or opinions that rest upon the report or opinion of an expert who does not attend should be struck out or accorded no weight. That is not a matter for determination on this application. The weight to be accorded any expert can only be determined after all the evidence and the representations of Counsel.

[27] The file materials of all the physicians, were challenged by the plaintiff, Ms. Tingley, who testified the doctors files were 75% accurate and 25% inaccurate. Although examples of inaccuracies were referenced by Ms. Tingley, clearly she did

not purport to identify all of the suggested inaccuracies. Many of the deficiencies, and inaccuracies, she identified related to what she says she told the doctor and which the doctor, according to the notes, charts, and reports in court, either omitted to record, or did so inaccurately. Some, however, relate to apparent observations made by the doctors. Counsel for Ms. Tingley suggests many of the examples are not relevant to crucial aspects of the files of these doctors, and in any event, are subject to correction by the evidence of many of the plaintiffs, including Ms. Tingley.

[28] In my view, these assertions describe the very reason why there is a need for the opportunity to cross-examine these doctors. It is for the doctors to say whether they recognize the possibility or likelihood of inaccuracies in their records and whether, and, if so, to what extent, they relied on these records in advising and treating the plaintiffs. In his submission Counsel asserts:

> It will be obvious ... that in some instances doctors incorrectly write down or recall facts given by a patient. To the extent that those are in error they will or have been corrected by the witnesses that testify. What is not being challenged by the witnesses is the medical conclusions or noted treatment as disclosed in the files.
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> As such, there is no basis to question the accuracy of those notations and if there is, it can be challenged through other witnesses.

[29] The submissions of Counsel would be more persuasive if it were not his own client that was challenging the accuracy "of these notations." In any event, the consequence of these challenges, highlight both the desirability and the necessity of the authors of these notations, where available, being present in court for cross-examination. It is only in this way that the Court will have their responses to the suggested deficiencies in their records and be able to assess both their accuracy as well as the extent the doctors potentially relied on inaccurate information, or misunderstandings of the true facts, in advising and treating the plaintiff, as well as in assessing the cause of any medical conditions the plaintiffs may have been experiencing.

[30] It may be, as Counsel appears to suggest, the suggested deficiencies and inaccuracies are unimportant in the doctors assessments of the plaintiffs' medical conditions and their suggested course of treatment. However, that conclusion requires an assessment of more than the submission of Counsel or the evidence of the plaintiffs; it also requires the evidence, were available, of the doctor involved.

[31] Where the doctor is now deceased, the court will have to weigh this circumstance and the notations, charts and records in assessing what weight, if any, to give to the deceased doctors file materials. Where the doctor is not now deceased, but for financial reasons the plaintiff would prefer not to bring them to court, additional considerations may prevail.

[32] Although the Court is mindful of the plaintiffs limited financial resources, having regard not only to the materials filed on this application but the evidence given in the trial to date, no case was cited suggesting financial considerations are a basis to displace the necessity of presenting evidence through witnesses that are made available for cross-examination, particularly when the evidence relates to issues crucial to the determination of the legal proceeding.

[33] In his written submission, after citing the earlier referenced passage from *Cavanaugh v. MacQuarrie, supra*, Counsel also noted paras 24 - 26:

> 24 I find that there is not sufficient evidence before me which would raise a reason doubt in my mind as to the efficacy of the blood sample. There is nothing so persuasive before me as was before the Cowan C.J.T.D., in the *MacLean* case, supra. Nor do I see any inconsistency between *Area v. Venner* and the *MacLean* case. In *MacLean,* Cowan C.J.T.D., found that the plaintiff had rebutted the prima facie case by raising a serious doubt as to the accuracy of the blood samples.

> 25 Even if the Supreme Court of Canada had not found as it did in *Ares v. Venner*, I am of the opinion that the medical records of the plaintiff would be admissible in Nova Scotia. Section 22(2) of the Evidence Act, R.S.N.S. 1967, c. 94 reads:
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> > 22(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> 26 It as established by the medical records librarian that these records were made in the "usual ordinary course" of the business of the V.G. Accordingly, such records are admissible as evidence of the "act, transaction, occurrence or event."

[34] Counsel then suggests:

> ... the doctors files and materials at issue here are admissible pursuant to the common law established by the Supreme Court of Canada in *Ares v. Venner* and also pursuant to The Evidence Act. In particular, the records were made contemporaneously with the events records (sic). They were made by doctors and/or medical personnel conducting tests who had personal knowledge and the record was made by persons under duty to make those records.

[35] The submission as to the circumstances of the making of these records is accurate, at least, as far as can be discerned from the evidence to date. However, "doubt has been raised as to the accuracy" of these records. The fact this "doubt" has been raised by one of the plaintiffs is even more telling.

[36] The plaintiffs' Counsel suggests the defendants can bring the doctors, should they wish to challenge their records or opinions. The presentation of the plaintiffs case is not for the defendants to make; by the very nature of the adversary system, the party proposing a position is required to present the evidence supporting their position. Although the court assesses all the evidence in reaching a conclusion, and the parties can rely on evidence produced by other parties that they believe supports their argument, this does not avoid the necessity of the party advancing the records or opinions of a witness, from themselves calling that witness. The file records of these doctors may be admitted, but the weight, if any, will have to be assessed in light of the challenge made to their accuracy, all the remaining evidence that may be relevant, as well as the omission, if that turns out to be the case, of these doctors to testify and be available for cross-examination.

[37] Consequently, the admission of these records, absent the authors, and in view of the challenge to their accuracy, may, depending on all the evidence presented, do little more than establish that they were made. The weight to be accorded to the records is a matter to be assessed and weighed, but only at the conclusion of the trial, and in view of all the evidence.

[38] **Conclusion on admissibility** There is a distinction to made between physicians' file materials, which are admissible in the manner described in *Ares v. Venner* and the *Nova Scotia Evidence Act*, and the physicians' opinions and experts' reports, which require the witnesses to be available for cross-examination.

[39] To the extent that the materials sought to be admitted are in the nature of records "made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record," they are, except to the extent challenged by the parties, admissible as *prima facie* proof of the facts stated in the records. While the phrasing differs somewhat, I am satisfied that such records are admissible under the hearsay exception described in *Ares* and under the *Evidence Act* provision for business records. Such records are subject to challenge as to their accuracy. This conclusion accords with the principles stated in *Seaman*, *supra*. As to opinions, I also follow *Seaman* in concluding that any "opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time."

[40] As a result, the physicians files are admissible pursuant to the hearsay exception and pursuant to the *Evidence Act* to the extent that they state facts, subject to challenge as to accuracy. The weight of such records, however, will have to await all of the evidence, including an assessment of the extent their accuracy and reliability are challenged by the witnesses and the remaining evidence. However, no opinions or diagnoses by the physicians are admissible for their truth. They may be admitted for the bare fact that they were made, and were available to other physicians with whom the plaintiffs consulted or were treated, but for no purpose beyond that.

[41] **Evidence by video-conference** I leave open the possibility that video-conferencing would be an appropriate method by which certain medical witnesses could testify.

[42] Pursuant to rule 31.02(1), "[u]nless it is otherwise ordered or an enactment or rule otherwise provides, a witness shall be examined orally and in open court." In *Horne v. Industrial Estates Ltd.* (1996), 152 N.S.R. (2d) 380, the plaintiff applied pursuant to Rule 18.14(1)(c) to use a discovery deposition of Dr. William

Deagle at trial, on the basis that the witness was unavailable to testify, residing, as he then did, in Colorado. Goodfellow J. said:

> [16] The onus is upon a party seeking to tender discovery evidence to satisfy the Court that despite all reasonable efforts the witness' attendance cannot be attained.
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> [17] The test is therefore one of establishing to the Court the "unavailability" of a witness now out of the jurisdiction.
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> [18] The Court does have a discretion to intervene in a situation where unnecessary, unreasonable expenses are being incurred. This is part of the mandate of the object of the Rules.
>
> [19] An example of such a situation might be where a witness (a party or otherwise) was examined on discovery on notice or with the other party in attendance, and the witness now resides out of the jurisdiction and although "available", attendance would be at a considerable price due to expense, great personal inconvenience due to health or the disruption of personal or business concerns etc. In such circumstances, it might not justify rigid adherence to the test if the evidence to be achieved by attendance is uncontroversial, ie. ownership, payment, condition of an all-terrain vehicle at the time of the accident, then in such circumstances, it would be unreasonable in the extreme to insist on the personal attendance if the existing discovery transcript would establish what was necessary and what would otherwise be achieved by going to the expense and inconvenience of the personal attendance of the witness.

[43] The plaintiff's position was that Dr. Deagle was "'unavailable' in the sense of it being beyond Mr. Horne's financial capacity to attend and have Dr. Deagle's evidence taken in Colorado." Goodfellow J. dismissed the application on the basis that "the evidence of financial incapacity is unsatisfactory, and there is no real capacity for the Court to relate financial incapacity to the expenses." He added:

> [31] Additionally, "unavailability" is not limited to the actual attendance of Dr. Deagle in Nova Scotia although this is preferred and may be determinative in cases to be decided solely on credibility. The actual situation in each case will dictate and possibly the availability and cost of video evidence may be an appropriate alternative where credibility is a major feature.
>
> [32] "Unavailability" basically relates to giving evidence "in the trial" so as to provide the defendants with their entitlement to cross examination. Cross examination is particularly important in this case so the defendants can put to the plaintiff's expert opposing expert's opinion. Wide latitude must be given to a party to test an opposing party's expert opinion evidence.
>
> [33] It is clear that economic conditions and other reasons are increasing the exodus of people into and out of Nova Scotia, and given this general knowledge, counsel should be able to indicate to the Court whether or not an opportunity existed to take the evidence of a witness prior to her/his departure. This may well be a factor for the Court's consideration.

[44] Several cases in Ontario have considered an Ontario Rule that permits a witness to testify by video-conference. Rule 1.08, in its current form, provides that "[i]f facilities for a telephone or video conference are available at the court or are provided by a party," the court may permit certain matters to be conducted in that form, including motions and oral evidence at trial, either by consent or by order. The relevant considerations appear at Rule 1.08(5):

> (5) In deciding whether to permit or to direct a telephone or video conference, the court shall consider,
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> (a) the general principle that evidence and argument should be presented orally in open court;
>
> (b) the importance of the evidence to the determination of the issues in the case;

> (c) the effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;
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> (d) the importance in the circumstances of the case of observing the demeanour of a witness;
>
> (e) whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;
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> (f) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and
>
> (g) any other relevant matter.

[45] In *Pack All Manufacturing Inc. v. Triad Plastics Inc.* (2001), 29 C.P.C. (5th) 354; 2001 CarswellOnt 5379 (Ont. S.C.J.), the plaintiff sought to admit the evidence of a witness from Virginia, on account of the expense of bringing the witness to Ottawa. The evidence was estimated at about half hour. There was no evidence that the witness was unable or unwilling to attend trial and testify. Her evidence was regarded as important and the cost of bringing her to trial was not disproportionate to the amount of money at issue in the proceeding. The defendant opposed the motion, despite having consented to certain other witnesses testifying by video, because there was a potential issue with the witnesses credibility. Rutherford J. made the following remarks about the evaluation of testimony given by video:

> 4 There is no doubt that the taking of evidence via video-conference can be effective and efficient and can reduce expenses and convenience witnesses....
>
> 6 In my experience, a trial judge can see, hear and evaluate a witness' testimony very well, assuming the video-conference arrangements are good. Seeing the witness, full face on in colour and live in a conference facility is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Court House. The demeanor of the witness can be observed, although perhaps not the full body, but then, sitting in a witness box is not significantly better in this regard. Indeed, I often wonder whether too much isn't made of the possible ability to assess the credibility of a witness from the way a witness appears while giving evidence. Doubtless there are "body language" clues which, if properly interpreted, may add to the totality of one's human judgment as to the credibility of an account given by a witness. The danger lies in misinterpreting such "body language," taking nervousness for uncertainty or insincerity, for example, or shyness and hesitation for doubt. An apparent boldness or assertiveness may be mistaken for candour and knowledge while it may merely be a developed technique designed for persuasion. Much more important is how the substance of a witness' evidence coincides logically, or naturally, with what appears beyond dispute, either from proven facts or deduced likelihood. I am not at all certain that much weight can or should be placed on the advantage a trier of fact will derive from having a witness live and in person in the witness box as opposed to on a good quality, decent sized colour monitor in a video-conference. While perhaps a presumption of some benefit goes to the live, in person appearance, it is arguable that some witnesses may perform more capably and feel under less pressure in a local video-conference with fewer strangers present and no journeying to be done.

[46] Noting several practical issues related to video-conference evidence, Rutherford J. said:

> 9 Counsel for the defendant raised other difficulties that may be encountered with a witness in another jurisdiction on a video-conference. He questioned whether she would be bound by an oath that is enforceable and how the court could ensure that she answer all proper questions. Those I do not see as particularly problematic. In *R. v. Dix* (1998), 16 C.R. (5th) 157 (Alta. Q.B.) Costigan J. noted that the video-conference witness in New York could be placed under oath on site in a manner that permitted New York sanctions to be applied in the event of perjury, and that failure of the witness to answer proper questions was a matter the trial judge could remedy in terms of either discontinuing the procedure or assigning appropriately less weight to the witness' evidence. Indeed, it seems to me that an order for evidence by video-conference made at the pre-trial stage always leaves

> ample scope to the trial judge to control proceedings at trial in such a way as to ensure that the trial is a fair one and that justice is properly rendered. It should be noted that Rule 1.08(4) expressly provides that the trial judge ...may set aside or vary and order ...for the taking of evidence by video-conference under (3).
>
> 8 [sic:10] There are other practical problems that would have to be overcome in preparing to take trial evidence by video-conference. The presentation to the witness of exhibits or documents by counsel examining in chief or cross-examining would have to be thought out in advance, and copies of the necessary documents readied for placing before the witness....

Rutherford J. concluded:

> 9 [sic:11] While there is much to be said for using the modern technology available and taking evidence by video-conference, it is not a manner of taking evidence available to parties as matter of right. Unless consented to by the opposite party, the Court must balance the relevant factors and determine whether the advantages of using video-conferencing outweigh the possible prejudice that might arise. In this case the balancing of interests is difficult. I'd say it is a close call. Inclined as I am to side with efficiency and the saving of time and cost, I am not persuaded by the plaintiff's application that there is enough to be gained to overcome the conventional rule that evidence be given by a witness, in person, in court, and the contention by counsel for the defendant that cross-examination of this important witness whose credibility is important to the trial may be rendered less effective. Here, since the defendant has consented to video-conference evidence for certain other witnesses, the additional expense is limited to only one witness. Perhaps most importantly, there is no evidence that the witness in question is unable or unwilling for any reason to come to Ottawa and testify of her own volition, assuming all her expenses are paid. Her evidence is important and the cost of bringing her is not all that great in relation to the amount of money at issue in the trial....

[47] The court noted that, in the event the plaintiff succeeded at trial and the trial judge concluded that the witness's evidence could as just as well have been presented by video, this could be reflected in costs.

[48] While the Nova Scotia Civil Procedure Rules do not specifically contemplate evidence by video-conference, it is necessary to be mindful that the object of the rules, as stated in Rule 1.03, is to "secure the just, speedy and inexpensive determination of every proceeding." In addition, Rule 31.02(1) provides that, "[u]nless it is otherwise ordered or an enactment or rule otherwise provides, a witness shall be examined orally and in open court." The authors of *Witnesses* suggest, with respect to nearly identical wording in a Newfoundland rule, that "there is no reason to believe that this sort of broad wording would not allow for video-conferencing" (p. 19-11). In discussing rules that provide a general discretion to allow evidence to be given by video-conference, Mewett and Sankoff suggest that "[a]s an exercise of the trial judge's discretion, any order for video-conferencing will have to consider the potential prejudice that may inure against the parties, and will likely examine factors not considerably different from those expressed in the jurisprudence from other jurisdictions" (p. 19-14.1). Arguably, such a discretion is implied in Nova Scotia Rules 1.03 and 31,02(1).

[49] Judgment accordingly.

J.