IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacIntyre v. RBC Life Insurance Company, 2010 NSSC 152

Date: April 16, 2010
Docket: Syd 219025
Registry: Sydney

Between:

Duncan F. MacIntyre and
Dr. Duncan MacIntyre Incorporated

v.

RBC Life Insurance Company

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: March 9, 2010, in Sydney, Nova Scotia

Counsel: Sandra Arab-Clarke, for the Plaintiffs
Nancy Rubin, for the Defendant

By the Court:

Introduction

[1] Dr. Duncan MacIntyre and his professional corporation have brought an action against the Defendant, his long term disability insurer. Dr. MacIntrye, in his claim commenced on April 8, 2004 alleges that he is unable to work, and is eligible to collect benefits pursuant to two policies of insurance issued by the Defendant. The Defendant asserts that Dr. MacIntyre does not meet the required policy definitions, and that he is not entitled to benefits. The trial of this matter has been scheduled for 23 days, commencing on May 31, 2010.

[2] In a Notice of Motion filed February 19, 2010, the Defendant seeks an order "requiring the Plaintiff, Duncan MacIntyre, to attend for a medical examination by psychiatrist, Dr. Edwin Rosenberg on Tuesday, March 9, 2010, or such time as agreed by the parties or as determined by the Court". The motion was originally scheduled to be heard on March 1, 2010 in Halifax, however, Dr. MacIntyre's Counsel raised concern with the matter being heard by the Chamber's judge in light of Civil Procedure Rule 29.01(1), which in most circumstances requires, once a judge is assigned to preside at trial, that motions be made before him or her. As I will be presiding over the trial of this matter, the Motion was re-scheduled before me, and was heard on March 8, 2010.

Relevant Civil Procedure Rules

[3] The Defendant in its Notice of Motion relies upon several Civil Procedure Rules, namely:

Rules 22 and 31.08 of the 1972 Rules, and

Rules 21.02 and 92.04(g) of the 2009 Rules.

[4] In their submissions, both Counsel agreed that Rule 21.02 (2009) applies with respect to the current Motion. However, by virtue of the transitional provisions contained in Rule 92.04(g) (2009), it is clear that Rule 31.08 (1972) applies to the timing governing the filing of expert reports. The most relevant portions of the above Rules read as follows:

> 21.02(1) A party who, by a claim, defence, or ground, puts in issue the party's own physical or mental condition may be ordered to submit to a physical or mental examination by a medical practitioner.
>
> (2) The party who puts their own physical or mental condition in issue has the burden to satisfy the judge that the party should not be examined.
>
> (3) A party who puts in issue the physical or mental condition of another party may make a motion for an order that the other party submit to a physical or mental examination by a medical

> practitioner, and the party must satisfy the judge on all of the following:
>
> (a) the party has, by a claim, defence, or ground, put in issue the other party's physical or mental condition;
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> (b) the claim, defence, or ground putting the other party's condition in issue is supported by the evidence;
>
> (c) the examination may result in evidence that proves or disproves the claim, defence, or ground.
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> 31.08 (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been
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> (a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and
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> (b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial,
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> the evidence of the expert shall not be admissible on the trial without leave of the court.

Position of the Parties

[5] The Defendant in its written and oral submissions put forward two primary arguments. Firstly, that Dr. MacIntyre has placed the status of his mental health in issue, and therefore relies upon Rule 21.02(2), asserting that he carries the burden to establish that the examination should not be ordered. The Defendant argues Dr. MacIntyre has failed to meet this burden, and the examination should therefore proceed. Secondly, the Defendant argues that it has only recently become aware that an assessment of Dr. MacIntyre's psychiatric condition and in particular treatment options may be relevant to the issues before the Court at

trial. Such an assessment is argued to be important in determining the potential causation of the Plaintiff's complaints, and that it is not "too late" in terms of the trial commencement on May 31st, to have it undertaken.

[6] Dr. MacIntyre's Counsel heartily disagrees. Although also citing Rule 21.02, Counsel argues that Dr. MacIntyre has not, by virtue of the pleadings, or otherwise, placed his mental health in issue. Further, it is submitted that the Defendant has not, by virtue of its defence, placed the Plaintiff's mental health in issue, and cannot rely upon Rule 21.02(3). In the alternative, if the Court determines that the Defendant has placed Dr. MacIntyre's mental health in issue as contemplated by Rule 21.02(3), his Counsel asserts the Defendant has failed to meet the burden outlined therein to warrant this Court ordering the assessment.

[7] Counsel for both parties presented the Court with case authorities in support of their respective positions, some of which addressed instances where expert reports were either admitted, or not, at various times prior to trial. Others are decisions relating to the ordering of medical assessments. Interestingly, both Counsel cite and rely upon the decision of Goodfellow, J. in *Noseworthy v. Murphy* (1999), 174 N.S.R.(2d) 367. Like the other authorities provided to the Court, the facts of that particular case have great bearing on the court's ultimate exercise of discretion to order a plaintiff to undergo an independent medical examination.

[8] Although decided under the former Civil Procedure Rules, Goodfellow, J. outlines several principles to consider in addressing requests for medical assessments. I view these principles to have continuing application under the current Rules, and in particular, considerations under present Rule 21.02. Recognizing that the Rule (then 22.01) permitting an independent assessment is intrusive upon a party's privacy, and must be clearly justified, Goodfellow J. outlines at paragraph 12 the following considerations:

> 1. The onus is upon the party applying for the independent medical examination to satisfy the court, on a balance of probabilities, that such a request is reasonable, and that the proposed examiner is properly qualified.
>
> 2. The entitlement of a party to personal privacy, physical and psychological integrity must not be breached lightly and only when the court is satisfied such is necessary to secure the just determination of the issues before the court.
>
> 3. A claimant should not be accorded an unfair advantage that can arise by permitting that person to have his/her medical and psychological condition examined, assessed and advanced without providing the opposing party, against whom relief and damages are sought, a reasonable opportunity to respond fully.
>
> 4. The party who advances a claim for damages, alleging that they flow from the negligent act of another party, removes the entitlement of privacy, to the extent that the claims advanced relate to the medical conditions being advanced or should be disclosed as relevant to the relief sought in damages.
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> 5. The court, in order to meet the object of the Civil Procedure Rules, CPR 1.03 has repeatedly indicated that the Rules are to receive a liberal interpretation. Civil Procedure Rules are our tools and not our masters.
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> 6. In MacInnes v. Maritime Beverages Ltd. [1989] N.S.J. No. 280, June 9, 1989, Kelly, J. granted an order that the plaintiff be tested by a psychologist, who specialized in rehabilitation counseling of

> the head injured. The Rule authorizes examinations only by a "qualified medical practitioner" and the court was satisfied there was a real requirement for this type of testing, to enable qualified medical practitioners to give an opinion and CPR Rule 22 was liberally interpreted, taking into consideration the expanding field of medical diagnosis and treatment.
>
> 7. The Interpretation Act provides some general guidance, although it does not specifically apply to rules of court. The Act provides that words expressed in the singular, include the plural and vice versa.

[9] The first four principles require comment in the circumstances of this particular motion. It would appear that the burden outlined by Goodfellow J., in the first principle above has been modified by Rule 21.02(2), if a claimant has put his own physical or mental health in issue. Whether such has occurred in the present instance will be addressed further below. The second principle should clearly continue to be considered by the Court, as should the third, each serving to balance fairness to the respective parties. The fourth principle, although of continuing applicability generally, does not apply in the present instance, as the matter before the Court is not a negligence claim where it is asserted that the Defendant has caused injury, but rather a claim involving the alleged breach of a contract of insurance.

Determination

[10] The sole issue to be determined in the motion before the Court is whether Dr. MacIntyre should be compelled to attend at a psychiatric assessment at the Defendant's request. That being said, there are a number of considerations

raised by Counsel which will ultimately impact on that determination, most notably the application of Rule 21.02, and in particular which party carries the burden under that Rule. It should be noted however, that the Court, regardless of which party carries the burden on the motion, ultimately retains discretion as to whether an assessment should be ordered in the particular circumstances before it.

a) Has Dr. MacIntyre put his mental health into issue?

[11] The above inquiry will be determinative as to which party carries the burden in the Motion. Counsel for the Defendant asserts that by virtue of his pleadings, Dr. MacIntyre has put his mental health into issue, and points to his claim for mental distress contained therein. Accordingly, the Defendant submits that the assessment should be ordered unless Dr. MacIntyre can establish to this Court, why it would be inappropriate to do so.

[12] I have carefully reviewed the Originating Notice and Statement of Claim filed on behalf of Dr. MacIntyre on April 8, 2004. Although Dr. MacIntyre claims he is incapable of working, there is no assertion that this is due to psychological or psychiatric reasons. The sole reference to the mental health of the plaintiff is contained within paragraph 11 of the Statement of Claim, which reads:

> 11. The Defendant was under a duty to assess the Plaintiffs' application for monthly benefits in good faith, but failed to do so. In violation of its duty of good faith the Defendant has:
>
> (a) instituted surreptious surveillance on Dr. MacIntyre without reasonable cause;

> (b) considered medical information which was improperly obtained;
>
> (c) failed to consider the medical information provided by the Plaintiffs; and
>
> (d) such other acts of bad faith as may appear.
>
> The Defendant's high-handed and arbitrary handling of Dr. MacIntyre's claim has caused the Plaintiff and his family to suffer severe anxiety and emotional distress.

[13] I cannot find, when considering the nature of the claim brought forward by Dr. MacIntyre that the above provision serves to "put in issue" his mental condition as contemplated by Rule 21.02(2). Dr. MacIntyre asserts that his ailments are physical in nature - he does not plead mental illness as a source of his "sickness" under the policy definitions. It is as an adjunct to the claim of bad faith that he asserts that he and his family have suffered mental distress due to the actions of the Defendant. This is not an uncommon pleading in such circumstances, and I do no accept that his mental condition, and in particular his psychiatric health, is being put in issue as a significant issue in the litigation.

b) Given the above determination, how does Rule 21.02(3) apply to the Motion?

[14] Counsel for Dr. MacIntrye submits that the Defendant has not, as required by Rule 21.02(3), put the Plaintiff's mental health in issue in its pleadings, and as a result, its Motion should not be considered at all. I cannot agree entirely with this assertion, as a reading of the Defence filed on June 21, 2004 does in

defending against the claim, raise the status of Dr. MacIntyre's mental health.

The relevant portion of paragraph 3 reads as follows:

> 3. As to the whole of the Statement of Claim, the Defendant says that it assessed the Plaintiff's application for monthly benefits in good faith and in accordance with accepted industry practice. The Defendant says that the Plaintiff has not established that he is unable to perform the important duties of his occupation because of "injury" or "sickness" as defined by the Policies and, in particular:
>
> (g) An independent medical examination be a medical specialist in the field of occupational and environmental medicine found no evidence of symptoms or subjective findings consistent with metal toxicity or heavy metal poisoning and *no evidence of cognitive impairment* or problems with coordination or dexterity;
>
> (h) An independent medical examination by a medical specialist in the fields of *psychiatry* and neurology found no objective physical signs or clear evidence of heavy metal or trace elements of toxicity and concluded *there were no medical conditions* preventing the Plaintiff from returning to work in his usual occupation. (Emphasis added)

[15] I view the above as the Defendant clearly bringing the mental condition of Dr. MacIntyre into issue. The Defendant appears to be asserting that, according to the opinion obtained from a medical specialist in the field of psychiatry, Dr. MacIntyre did not suffer from a condition which may afford him coverage by virtue of the policy definitions. Interestingly, the Defendant now appears to be taking a different approach in support of the Motion, namely that the psychiatric assessment is being sought to identify whether Dr. MacIntyre's psychiatric condition is such that, if appropriately diagnosed and treated, he may be able to return to work.

[16] The purpose and goal of the requested psychiatric assessment is succinctly stated by the proposed assessor himself, Dr. Edwin Rosenburg, whose letter of February 18, 2010 is before the court as an exhibit to Mr. Norton's affidavit. He writes:

> Many of Dr. MacIntyre's symptoms may also be present in various emotionally based syndromes, such as somatoform disorders, anxiety disorders, and major depression. In consideration of these conceivable causes of Dr. MacIntyre's continuing symptoms, and the likelihood of there being psychiatric therapeutic intervention(s) to alleviate symptomology, it is my opinion that psychiatric consultation should be offered to Dr. MacIntyre in consideration of these possibilities.

[17] Where the Motion becomes problematic for the Defendant in my view, is the consideration of Rule 21.02(3)(b) and (c) which requires that the "other party's condition in issue is supported by the evidence", and that "the examination may result in evidence that proves or disproves the defence".

[18] The Defendant asserts that the need for a psychiatric assessment only became known after receiving the report of Dr. Jean Saint-Cyr, dated December 15, 2009, also exhibited to the affidavit of Mr. Norton. Dr. Saint-Cyr was requested by the Defendant to examine Dr. MacIntyre, and is described as "Specializing in Neuropsychology, Psychology and Medical-Legal Psychology". This was the third independent assessment requested by the Defendant. In his report Dr. Saint-Cyr describes the purpose of the referral to "determine the presence and extent of psychological and cognitive impairment and the impact of such impairments on his capacity to work and to carry out his normal daily activities." What is critical

to the Defendant in support of this Motion, is that Dr. Saint-Cyr makes a diagnosis under the DSM-IV-TR of “Conversion disorder”. The Defendant wants this further assessed by a specialist in the field of psychiatry, suggesting that it may provide a means of assistance to Dr. MacIntyre.

[19] I have carefully reviewed Dr. Saint-Cyr’s report. I do not find therein, any indication that a referral for psychiatric assessment or treatment is being suggested. Other specific recommendations are made by Dr. Saint-Cyr , as follows:

> Dr. MacIntyre should consider a consultation with a Pain Clinic and treatment options such as Lyrica, Neurontin or other medications used to manage chronic pain. In particular his trigeminal nerve function ought to be assessed by a neurologist or neurosurgeon specializing in chronic pain.
>
> Once the pain is brought under control, he should embark on a reintegration to his career.

[20] I am also aware from the material before me, that Dr. MacIntyre has seen several other experts who have addressed the issue of his mental health. A number of the reports before me raised questions about potential psychological factors which may be impacting upon Dr. MacIntyre’s circumstances . These have been addressed in the report of the Plaintiff’s expert Dr.Oaou and Dr. Saint-Cyr’s report in response. Is there sufficient evidence which establishes that a psychiatric assessment will enhance the opinions already made available to the

parties? I find that there is not, and that the Defendant has not established that the assessment is warranted pursuant to Rule 21.02.

c) Timing concerns

[21] The Court is also very concerned with the timing of the requested assessment, and the impact it may have on the scheduled trial dates. Dr. MacIntyre's Counsel has argued that should the assessment be ordered, it is very likely that it may trigger the need for a rebuttal report. Counsel for the Defendant asserts that there is adequate time for the Plaintiff to seek out the appropriate expert, make the referral, arrange an assessment, and obtain a report. The Court can not accept that such is the case. Such may result in the plaintiff not being afforded the opportunity to adequately respond to the opinion of Dr. Rosenburg, or alternately an adjournment being considered. As noted above, this matter has been scheduled for 23 days of trial time. If adjourned, re-scheduled dates for a trial of that duration could be significantly into the future.

[22] As noted above, Rule 31.08 (1972) applies to the filing of expert reports in this matter. It is clear that the filing of the Rosenburg report, or one in rebuttal commissioned by the Plaintiff, would be well beyond the deadlines outlined in the Rule. Although the parties could certainly seek leave of the Court to have the reports filed, the existence of the deadline serves as a strong indicator that, where possible, the introduction of expert opinions should be timely, and certainly not at a stage that potential prejudice may result.

[23] In the discretion of the Court, for the reasons outlined above, the Motion is dismissed.

Costs

[24] Counsel for Dr. MacIntyre asserts that costs, payable in any event of the cause is appropriate. Counsel for the Defendant argues that costs in the cause is the typical determination in such motions. I note that the Defendant, in the draft Order submitted with its Motion materials, seek costs payable forthwith should it have been successful.

[25] In light of the preparation which clearly went into addressing the Defendant's Motion, it is appropriate that costs be set, and awarded payable forthwith to the Plaintiff. Costs are set at $1000.00.

J.