SUPREME COURT OF NOVA SCOTIA
Citation: Murphy v. Lawton's Drug Stores Ltd., 2010 NSSC 289

Date: 20100721
Docket: Hfx. No. 281666
Registry: Halifax

Between:

Sonya Murphy

Applicant

v.

Lawton's Drug Stores Limited

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	May 25, 31, 2010, in Halifax, Nova Scotia
Counsel:	Nicole Snow, for the applicant David Miller, for the respondent

By the Court:

[1] This is an application pursuant to Rule 14.12 for production of the defendant's store maintenance and inspection logs from January 1, 2006, to December 31, 2007 and occupational health and safety checklists from January 1, 2006, to December 31, 2007. The plaintiff's claim arises from personal injuries and damages allegedly resulting from an alleged slip and fall in the defendant's premises on June 20, 2006. She alleges that she slipped on a substance on the floor and sustained upper-body injuries.

BACKGROUND

[2] On discovery of the defendant's witnesses, it became apparent that the defendant had maintained daily monitoring logs and monthly inspection reports before and after the alleged slip-and-fall. The plaintiff requested production of the documents for the period January 1, 2006, to December 31, 2007. The defendant produced the monitoring log for June 20, 2006, and the inspection report for June 2006, and claims that this is sufficient production on the issue of whether it had a maintenance or inspection system. Documents on a wider scope of time would be irrelevant, according to the defendant. The plaintiff says the documents produced

do not establish the existence, implementation or maintenance of an inspection system.

[3] The object of the *Civil Procedure Rules* is "for the just, speedy, and inexpensive determination of every proceeding": Rule 1.01. General matters of disclosure and discovery are governed by Part 5. Rule 14.01 defines "disclosure" for the purposes of disclosure and discovery:

> 14.01 (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
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> > (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
> >
> > (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.
>
> (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

[4] The importance of full disclosure of relevant material is emphasized by Rule 14.08(1), which provides that "[m]aking full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a

proceeding." The court's power to order production is set out at Rule 14.12, which provides, in part:

> (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.
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> (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.
> ....
>
> (4) A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.

[5] Rule 15 provides for disclosure of documents (as opposed to electronic information): Rule 15.01(1). Rule 15.01(2) requires that "[a] party must disclose documents in the control of the party, in accordance with this Rule." The contents of the duty to disclose relevant documents are described at Rules 15.02 and 15.03:

> (1) A party to a defended action or a contested application must do each of the following:
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> > (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
> >
> > (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;
> >
> > (c) acquire and disclose relevant documents the party controls but does not actually possess.

[6] The scope of discovery is addressed at Rule 18.13:

> (1) A witness at a discovery must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.
>
> (2) A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is relevant or provides information that is likely to lead to relevant evidence.
>
> (3) A witness who cannot comply with Rule 18.13(2) may be required to make production, or provide access, after the discovery or at a time, date, and place to which the discovery is adjourned under Rule 18.18. [...]

[7] In her statement of claim, Ms. Murphy alleges that she was injured by falling on a slippery substance on the floor while walking in an aisle of the defendant's drugstore. She says the defendant failed to take reasonable care to protect her from unusual danger, including failing to have in place a reasonably adequate system for maintaining or inspecting the floor, and failing to implement any system that did exist. There are other particulars of negligence alleged that are not relevant here. The defendant denies liability and disputes the allegations of negligence, maintaining that Mrs. Murphy failed to take proper care for her own safety, or that she wore improper or inadequate footwear.

[8] The plaintiff bases her claim from disclosure on the presumption of full disclosure under Rule 14.08(1), asserting that a party who seeks to modify that obligation must obtain court approval under Rule 14.08(3). The defendant asserts that documents must be relevant before there is any requirement to produce them,

except where the document, while not relevant, is likely to lead to relevant evidence. This exception is of no significance here because the applicant claims the documents sought are relevant.

[9] The defendant also refers to comments by the courts as to the purpose underlying the changes in the *Civil Procedure Rules*. The changes reflected the need to reduce the expense of litigation and to thereby improve access to justice. I agree the current Rule was intended to limit the effort and expense involved in pre-trial procedures, including discovery and production of documents.

[10] The discovery and disclosure provisions of the 2009 *Civil Procedure Rules* depart from the *Civil Procedure Rules 1972*, in that, whereas the 1972 Rules provided for production of documents related to any matter in the proceeding, the 2009 Rule limits production to documents that would be relevant to an issue at trial. While the 1972 rule, on its face, provided a more expansive scope of discovery, on its face, the plaintiff maintains that although it is evident that Rule 15.01 is more restrictive than Rule 20.01 of the 1972 Rules, it should nevertheless be given a liberal interpretation. The plaintiff relies on *Dowling v. Securicor*

Canada Ltd., 2003 NSCA 69, [2003] N.S.J. No. 237 (C. A.), where Bateman, J.A., for the court, stated, at para. 9:

> The case law in this province consistently endorses a liberal interpretation of the *Civil Procedure Rules* and, in particular, those Rules encouraging pre-trial disclosure. In *McCrea v. Historic Properties Ltd.* (1988), 89 N.S.R. (2d) 201; [1988] N.S.J. No. 449 (Q.L.) (C.A.), Clarke, C.J.N.S. wrote, for the Court:
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> > [8] In *Imperial Oil Limited v. Nova Scotia Light and Power Co. Ltd.* (1974), 10 N.S.R. (2d) 679; 2 A.P.R. 679, Coffin, J.A., speaking for this court, at p. 691, affirmed the principle that Civil Procedure Rule 20.01 is to be given a liberal or wide construction. In *McCarthy v. Board of Governors of Acadia University* (1976), 22 N.S.R. (2d) 381; 31 A.P.R. 381, Chief Justice Cowan stated at p. 385,
> >
> > > "It will be seen, by reference to r. 20.01(1) that the test as to whether or not a document is to be listed is whether it is a document relating to any matter in question in the proceeding."
> >
> > [9] The reason for giving a liberal interpretation in the application of rule 20.01 is to provide a full disclosure to the parties on matters in issue and thus assist in the disposition of issues before or at trial. It is also intended to permit a party to test the validity of the allegations being advanced....

[11] The defendant acknowledges that the “semblance of relevancy” test applied before 2009, when the new *Civil Procedure Rules* came into force: *Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp.* (1994), 137 N.S.R. (2d) 123, 1994 CarswellNS 265 (S.C.), at para. 20. Affirming the decision of Davison, J., the Court of Appeal said, at 141 N.S.R. (2d) 180, 1995 CarswellNS 436, at para. 23, “[t]he appellant may succeed at trial in demonstrating that the documents lack relevancy. That issue must be determined by a trial judge. At this

stage of the proceeding, particularly in respect to the allegations in tort, as the chambers judge said, the documents have a 'semblance of relevance'." The defendant notes the statement in *Halifax Dartmouth Bridge Commission v. Walter Construction Corp.*, 2009 NSSC 403, [2009] N.S.J. No. 640 (S.C.), to the effect that the new rules impose a more stringent threshold. Some caution is necessary in applying that decision, as it was substantially argued under Rule 18 (Discovery) and the additional phrase "likely to lead to relevant evidence" was considered in that context. However, the essential statement that Rule 15 permits a less expansive scope of documentary disclosure than Rule 20.01 formerly did remains valid.

[12] I believe support for this view can be found in Professor Thompson's "Overview of the New Rules" (found in the LexisNexis edition of the *Nova Scotia Civil Procedure Rules*, 2d edn.). He regards the imposition of restrictions on disclosure and discovery as "the biggest change in the new Rules, a shift away from the liberal discovery of the 1972 Rules and the culture of openness that flowed from those Rules. At every turn, disclosure and discovery have been narrowed and restricted" (p. 106). Offering the example of a "narrower test for relevance, one of 'trial relevance.'," Professor Thompson notes that the new rule

has the effect of significantly narrowing the "semblance of relevance" test. He suggests, however, that "[i]t will likely be impossible to confine 'relevance' as tightly as Rule 14.01 suggests," for various reasons. The pleadings, he notes, will have only just closed when the determination is made, meaning that "the issues will still be poorly defined, and discovery will still serve an investigative function" (as in *Halifax Dartmouth Bridge Commission*). Professor Thompson also points out, inter alia, that "the tradition in Nova Scotia has been to err on the side of liberal discovery..." (P. 107).

[13] I am satisfied that the test of "semblance of relevance" under the 1972 Rules represents a lower threshold than relevance at trial, although I will not comment on Professor Thompson's suggestion (at p. 107) that "it is likely that the new 'trial relevance' test will end up looking like just a slightly-tougher 'semblance of relevance' test."

[14] It is necessary, then, to consider the meaning of "relevance." Sopinka, Lederman and Bryant, in *The Law of Evidence in Canada*, 3rd edn., state, at paras. 2.33 and 2.35:

> §2.33 ... Evidence is not admissible unless it is: (1) relevant; and (2) not subject to exclusion under any other rule of law or policy. Therefore, the trial judge will

> determine whether the proffered evidence is relevant. If it is not, it will be rejected....
> ....
>
> §2.35 A traditionally accepted definition of relevance is that in Sir J.F. Stephen's *A Digest of the Law of Evidence*, where it is defined to mean:
>
> > ... any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.
>
> Pratte J. in R v. Cloutier [[1979] 2 S.C.R. 709] accepted a definition from an early edition of *Cross on Evidence*:
>
> > For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.
>
> Although the question of relevance, and admissibility generally, is for the trial judge, whether a fact bears the required relationship to another fact is not usually determined by the application of a legal test. It is an exercise in the application of experience and common sense. Thayer believed that logic (not the logic of deductive reasoning, but of knowledge and experience) provided the best guide to the application of this fundamental principle of evidence law. Doherty, J.A., in *R v. Watson* [(1996), 30 O.R. (3d) 161] stated that "relevance"
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> > ... requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation, then "Fact A" is relevant and *prima facie* admissible.

[15] In *The Law of Evidence*, 5th edn. (2008), David M. Paciocco and Lee Stuesser summarize the concept of relevance at §3.1:

> While the concept of materiality describes the relationship between evidence and the matters in issue, logical "relevance" is about the relationship between evidence and the fact it is offered to prove. *There is no legal test for identifying*

> *relevant evidence. Relevance is a matter of logic. To identify logically irrelevant evidence, ask, "Does the evidence assist in proving the fact that my opponent is trying to prove?" For example, evidence that the breath of the accused smelled of alcohol is relevant to whether her ability to drive was impaired by alcohol. Evidence that she was seen drinking alcohol a week before is not.* [Emphasis added.]

[16] The authors add, at §3.3:

> Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence. As the Supreme Court of Canada has said [in *R. v. Arp*, [1998] 3 S.C.R. 339]:
>
> > To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the possibility of the existence of a fact in issue." ... As a consequence, there is no minimum probative value required for evidence to be relevant
>
> For example, imagine that the evidence offered is that, like the accused, the assailant had brown eyes. "While such evidence may have little ... probative value, given the prevalence of brown-eyed people in the relevant population, nonetheless, it is still relevant to identity" since it is a point of consistency between the accused and the assailant. Given that there is no minimum level of probative value required for evidence to be relevant, it is important to be wary of statements that seem to describe more exacting standards. In *Cloutier v. R.*, for example, Pratte J. said: "For one fact be relevant to another, there must be a connection or nexus between the two which make it possible to infer the existence of one of the existence of the other." Such passages cannot be taken to mean that evidence, on its own, must establish the facts sought to be proved before it is relevant. Consider the implications of such an interpretation. It is not possible to infer that the accused is the assailant simply because both have brown eyes, yet their similar eye colour must be taken into account with the other evidence in the case to see whether the fact sought to be proved – identity – has been established.
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> A similarly exaggerated articulation of the standard of logical relevance asks whether the proposition sought to be established inevitably follows from proof of the evidence in question. This can be called the "just because" test of relevance: "Just because fact X exists does not mean fact Y exists." In *Wray v. R.* [[1974] 1 S.C.R. 565], for example, Ritchie J. dismissed as irrelevant evidence that the accused had voluntarily attend for his trial, though the defence argued that this

> evidence helped demonstrate Wray's innocence. His attendance at the trial is not relevant to his guilt or his innocence because, as a matter of experience, persons compelled by law to attend their trials typically do so, whether guilty or innocent. The language used by Ritchie J., however, can be read suggest a "just because" test: "[T]he appellant's voluntary appearance at his trial does not necessarily give rise to any [exculpatory] inference." Again, circumstantial evidence may not cause the trier of fact ultimately to draw the conclusion it is tendered to establish, but it is relevant enough to be admissible if it has some tendency in logic to move the trier in that direction.
>
> Thus, evidence that has any tendency as a matter of logic to advance the proposition sought to be proved will pass the logical relevance hurdle. Logically relevant evidence may still be excluded as a result of an exclusionary rule or through the operation of an exclusionary discretion.

[17] Mewett and Sankoff, in their book *Witnesses*, vol. 1, make the following remarks about relevance at p.1-13:

> Evidence must, therefore, be relevant to a fact in issue, the quality of testimony given by a witness, or to other relevant matters raised by a party to the dispute, in that it assists in the proof or disproof on such a point. But to state the principle in such a way demonstrates the difficulty of defining what [is] relevant in the abstract. Relevance is not a black or white concept. Evidence may range all the way from being conclusive proof of an issue down to being vaguely and only of the slightest assistance and from there down to the point when it ceases to be relevant. While there is no difficulty in determining relevance at the upper end of the scale, the problem that arises is usually at the lower and of the scale.

[18] In *Morris v. The Queen*, [1983] 2 S.C.R. 190, the accused was charged with conspiring to import a narcotic from Hong Kong. The Crown sought to introduce a newspaper clipping found in his apartment describing how drugs moved from Pakistan to North America. On the question of the relevance of the clipping, McIntyre, J. said, for the majority, at pp. 191-192:

> In my view, an inference could be drawn from the unexplained presence of the newspaper clipping among the possessions of the appellant, that he had an interest in and had informed himself on the question of sources of supply of heroin, necessarily a subject of vital interest to one concerned with the importing of the narcotic. It is this feature which distinguishes the case at bar from *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, where the purpose of the impugned evidence was to show that the accused was a user of marijuana and had the necessary *mens rea* for the offence of importing. Pratte J. dealt with the matter in these words, at p. 734:
>
> > The question to be resolved in the case at bar is whether the fact that the accused uses marijuana creates a logical inference that he knew or ought to have known that the dresser contained a narcotic at the time it was imported. To me there is no connection or nexus between either of these two facts.
>
> In the case at bar the connection of nexus, absent in the *Cloutier* case, was clearly present. Depending on the view of the trier of fact and the existence of other evidence, an inference could possibly have been drawn or could have been supported to the effect that preparatory steps in respect of importing narcotics had been taken or were contemplated.

[19] McIntyre, J. added, at pp. 192-193:

> I agree that the probative value of such evidence may be low, especially since the newspaper article here concerns the heroin trade in Pakistan rather than in Hong Kong, which was apparently the source of the heroin involved in this case. However, admissibility of evidence must not be confused with weight. If the article had concerned the heroin trade in Hong Kong, it would of course have had greater probative value. If the article had been a manual containing a step-by-step guide to importing heroin into Vancouver from Hong Kong, the probative value would have been still greater. The differences between these examples, however, and the facts at bar are differences in degree, not kind. In other words, the differences go to weight and not to admissibility.

[20] In *Sydney Steel Corp. v. Mannesmann Pipe & Steel Corp.* (1985), 69 N.S.R. (2d) 389, 1985 CarswellNS 93 (S.C.T.D.), Hallett, J. (as he then was), stated, at paras. 15-16:

> As relevancy is the issue on this application, it would not be inappropriate to consider what constitutes relevancy. The most accepted meaning of the word relevancy seems to be that made by Stephen in his *Digest of the Law of Evidence* and referred to by *Cross on Evidence* (4th ed., 1974), at p. 16 where Sir Rupert Cross states:
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> > It is difficult to improve upon Stephen's definition of relevance when he said that the word 'relevant' means that:
> >
> > > any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.
>
> P.K. McWilliams, Q.C., in *Canadian Criminal Evidence* (2nd ed., 1984), at p. 35, in a section dealing with the meaning of relevance, makes reference to this quotation from Stephen's Digest and goes on to state: "Relevancy is also defined simply as whatever is logically probative or whatever accords with common sense." McWilliams goes on to state that one must keep in mind that the decisions on issues of fact are left to the common sense of the jury and therefore it is pointless to attempt to arrive at a precise or philosophical definition of relevancy.

[21] The defendant has disclosed the floor and exterior maintenance log for June 20, 2006. It identifies the store location. It provides a space to enter certain information, such as the department and outside weather conditions. It also requires an entry each time the floor is swept, mopped or inspected, using precise times and to record “exactly what ‘you’ did”. An employee inspecting the floor is required by the form to indicate the patrol time, to state whether cleanups were necessary and to describe the condition such as spills, debris, objects on floor, and mats and other relevant information. There is a space for the individual conducting the inspection to add his initials. If the inspection relates to the exterior of the

premises, the individual has to indicate if the sidewalks were snow- or ice-covered and whether salt was placed.

[22] The incident report form completed on June 20, 2006, relates the details of the alleged fall. Mr. Murphy's comments about her alleged fall and those of the members of the defendant's staff appear on this report. The defendant also disclosed a retail monthly inspection report for June 2006. This covers a number of areas, including floor inspection, use of floor logs and recording of time.

[23] The plaintiff's counsel was permitted to file a supplementary affidavit (outside the time limits) in order to place before the court the copies of the documents which had been produced. However, the affidavit purported to cover more than that. It related evidence given at discovery by two of the defendant's employees. The defendant objected, arguing that placing summaries of discovery evidence before the court in this way was in effect putting counsel in a position of giving evidence. I believe that the appropriate approach was to attach a discovery transcript, or parts of one, as an exhibit. The offending part of Ms. Snow's affidavit – namely paragraph 6 – is consequently struck.

[24] The plaintiff says one of the issues is whether the defendant had a reasonably adequate system of maintenance and inspection in place. The plaintiff argues that evidence of such a system is relevant, and the issue cannot be resolved by disclosing a single document for the date in question and one monthly report. The plaintiff says any system relates to a period before and after the alleged fall.

[25] The defendant says the plaintiff has failed to introduce evidence of the lack of a system. Further, it is argued that there is no basis for the claim that maintenance logs and inspection sheets for the two-year period requested would assist the court in assessing whether the defendant had a reasonably adequate system in place and whether such a system was being properly maintained, other than an inference that might be drawn that floor logs are intended to record inspections on some unknown basis. The defendant also submits that the additional records cannot assist the court in determining whether there was a reasonably adequate system of inspection in place on the date of the accident.

[26] The defendant maintains that an occupier of premises in its position is required to do two things to have in place a proper system of inspection so as to identify and remedy dangerous conditions which may develop unknown to the

occupier and to demonstrate that the system functioned adequately on the date of the loss. The defendant submits that the daily log of June 20, 2006, and the monthly report of June 2006 will permit a determination of whether the system operated as intended. The recordings on the daily sheet would be evidence of how the system operated, not necessarily how it was intended to operate, and the same can be said of the documents requested. Whether the system was properly operational on days other than June 20, 2006, the defendant says, is not relevant to liability for the plaintiff's fall on that day. The question for the trier of fact will be whether the evidence establishes that the system was functioning as intended based on evidence of what happened on day of the plaintiff's fall.

[27] The plaintiff further asserts that it is impossible for her to assess whether the defendant changed or modified its maintenance system after the alleged fall without disclosure covering that period as well. The plaintiff cites *Cheevers v. Halifax Regional Municipality*, 2005 NSSC 153, where Moir, J. ruled that evidence of post-accident measures taken by the defendant to correct deficiencies in the maintenance and inspection program was relevant to the claim for negligence. The defendant argues that *Cheevers* has no relevance because there is no evidence of post-accident changes.

[28] In *Plawiuk v. Canada Safeway Ltd.* (1990), 115 A.R. 214, 1990 CarswellAlta 562 (Alta. Master) the plaintiff tripped over carpeting on a tile floor in a grocery store. She sought production of the defendant's sweeping logs. The plaintiff alleged that there was a substance on the carpet and that the defendant had not properly swept the floor. The Master ordered production of the logs for the day of the accident and two preceding days because there was an allegation that the sweeping had not been done properly and that the store that allowed a substance to accumulate on the carpet; the Master considered that this was the maximum period of time for which the janitorial procedure could be related to the accident. A wider scope of production was not ordered because sweeping might be only be relevant if the plaintiff pleaded that the defendant swept the debris under the carpet and, further, the state of the premises a month before the accident was not relevant to the state of the premises on the date of the accident.

[29] In *Hepworth v. Canadian Equestrian Federation*, 2000 ABCA 327, 2000 CarswellAlta 1529 (Alta. C.A.), the plaintiff was injured in an equestrian accident. She had signed an agreement and a release. When asked about her experience with the release forms, she refused to answer on the advice of counsel. The Court of

Appeal held that, having pleaded that she had been a rider for at least 22 years, her past experience might impact on the nature of the implied terms, or the alleged representations, and whether they were relied upon. The defence raised the plaintiff's previous experience in signing release forms. Conrad, J.A. said, at paras. 9 and 12:

> In determining whether Hepworth consented to the risks involved, the surrounding circumstances will be examined. Furthermore, the validity of issues raised in the pleadings should be left to the trial judge....
> ....
>
> With respect, we feel that the learned Chambers Judge erred in confining his analysis merely to the interpretation of the release, and we are concerned that he seemed to conclude that the plaintiff's admissions were more definitive than they appear to be. He did not deal with the allegations in her pleadings relating to her experience, her reliance on implied terms of the contract and representations made that were relied upon, nor did he deal with the defence of *volenti non fit injuria*; all of which involve an examination of surrounding circumstances and her experience. The appellants' questions "touched the matters in question" and were "relevant and material," as that phrase is defined in the amended Rules.

[30] In *Bank of Nova Scotia v. British Airways* (1987), 9 F.T.R. 110, 1987 CarswellNat 321 (Fed. T.D.), the claim was for a loss of a quantity of gold coins in transit from Johannesburg to Toronto by air, via Nairobi and Heathrow. The defendant attempted to limit its liability under the Warsaw Convention. The plaintiff sought production of all documents relating to, *inter alia*, the defendant's security system, policies for handling valuable cargo, and previous losses. A Federal Court prothonotary ordered production of documents for three years prior

to the date of the loss, on the basis that there was evidence that other losses were known to have occurred in the past, and a central allegation by the plaintiff was that the defendant did not follow its own procedures.

[31] In *Perreault v. Jim Pattison Development Ltd.*, 2000 ABQB 687, 2000 CarswellAlta 1100 (Alta. Master), the plaintiff slipped and fell on a substance on the floor in the defendant's store. She sought production of maintenance logs for six months prior to her fall. She had been provided with the maintenance log for July 30, 1997 (the date she fell) and for June 1 to July 27, 1997. The Master concluded that the plaintiff's intention was likely to use the logs to show that the defendant's maintenance was inadequate to meet its duty under the Alberta *Occupiers Liability Act*. The Master noted that "[t]he Rule for production of documents at the time of the *Plawiuk* case required the documents be relevant. The present Rule is narrower, requiring the record be both relevant and material" (para. 14). Finding that this requirement was not met, the Master dismissed the application.

[32] In *Sunnar v. U-Haul Co. (Canada) Ltd.* (1998), 24 C.P.C. (4th) 179, 1998 CarswellBC 1730 (B.C.S.C.), the applicant was towing a vehicle on a dolly rented

from the respondent. The dolly swung and the applicant's vehicle was forced off the road. The applicant sought to compel the respondent to produce accident claims records involving dollies where sway or lack of brakes might have caused accidents. The applicant alleged that the records related to both design and warning issues. There was evidence that there had been prior accidents and sway bars or brakes were a factor. The chambers judge stated, at para. 7:

> ... [I]n a products liability case, relevant issues include whether there is a pattern of past failure of the product or whether there is a pattern of accidents which would, in turn, indicate a defective design or a failure to warn the consumer of certain risks. Records of accidents, complaints and litigation may indicate a defect in design or a risk inherent in the use of the product that requires a warning. Thus, the documents sought are potentially relevant.

[33] In *Liu v. West Edmonton Mall Property Inc.* (2000), 279 A.R. 305, 2000 CarswellAlta 1332 (Alta. Q.B.), the production at issue related to safety logs and incident reports from a water park first-aid station for one year prior to the accident. On appeal of an order made at a pre-trial conference, the court held that production of documents beyond those relating to the operation of the water slide in question would not facilitate expedited and inexpensive litigation and would not significantly help determine the issues raised. The court said, at paras. 19-23:

> Whether the documents in this case are relevant and material is ultimately based upon a determination of whether production of safety logs for the entire World Water Park for one year will significantly help to resolve the issues raised in the pleadings. Although the application of Rule 186.1 turns on the facts of each case,

it is helpful to review some of the jurisprudence that has defined the term "relevant and material" for purposes of Rule 186.1.

20 What is relevant and material is dependant on the scope of the pleadings.... Further, in *D'Elia v. Dansereau* (2000), 82 Alta. L.R. (3d) 298 (Alta. Q.B. [In Chambers]) Perras J. considered Rule 186.1 in the context of oral discovery. He found that any analysis to determine the propriety of disputed questions on oral discovery must start with an examination of the pleadings. The pleadings give meaning to what is relevant and material for purposes of discoverability.

Other guidelines that have been suggested to give some definable scope to Rule 186.1 are:

> 1. Conjecture is not sufficient to permit discovery of documents: *Franco v. Hackett*, 2000 ABQB 241 (Alta. Master);
>
> 2. The current terms of "relevant" and "material" substantially reduce the scope of this Rule from the prior Rule which was very broad and all encompassing. It permitted discoverability if the documents "touched the matters in question" and fell within the bounds of reasonableness: D'Elia, supra at para. 16.

As Master Funduk aptly stated in *Franco, supra,* the new terms of "relevance" and "materiality" eliminate the old fishing expeditions. "There is no fishing without first evidence that there are fish in the pond and a reasonable amount of fish" (at para. 34). This is the test that must be satisfied to allow records to be discoverable.

It is important to note that when considering the scope of discoverable documents, if the prejudice which may flow from such evidence attained through the discovery process is greater than any weight which might be attributed to it, it should not be introduced: *Plawiuk v. Canada Safeway Ltd.* (1990), 115 A.R. 214 (Alta. Master). Although I appreciate this case was decided under the prior Rule, the principle remains the same. This is especially so considering this ruling was made under an even broader procedural authority.

[34] The court continued, at paras. 26-28:

The main issues in these proceedings are whether the Appellant failed in its duty of care by failing to advise the Respondent of the inherent danger of the water slide, by failing to properly instruct and advise him as to the proper method of

> descending down the water slide, and further by failing to provide a safe premises. Is the documentation requested relevant to establish the forseeability of such an incident occurring? Furthermore, does the prejudicial value of such a quantity of documents vastly outweigh any probative value?
>
> I find that the production of safety logs and incident reports beyond the operation of the water slide, Nessy's Revenge would not facilitate expedited and inexpensive litigation, would not significantly help determine the issues raised, and further would be highly prejudicial to the Appellant, outweighing any probative value that would be obtained.
>
> Therefore, production is to be limited to the safety logs and incident records from the first aid station pertaining to the water slide, Nessy's Revenge. As the Appellant conceded that the duration of production, namely one year, was fair, that condition will remain. Production will encompass one calendar year preceding July 20, 1999.

[35] I note that the Alberta rule refers to both materiality and relevance, but I do not believe that the fact that the added factor of materiality is of significance to the present analysis.

[36] The plaintiff seeks production of two years of documents to show that the defendant did not have a system in place or that its system was improperly maintained on the date of her accident. At the hearing counsel for the plaintiff agreed that the period covered in her notice of motion namely Jan 1, 2006 to December 31, 2007, was expansive and she was willing to go accept disclosure for a more restrictive period.

[37] In its defence, the defendant denies the claim that it had no reasonably adequate system of maintenance or inspection, and that it failed to properly implement any system that did exist. The effect of this denial is to assert that there was such a system in place, and that the defendant did not fail to properly implement it. The plaintiff says it is impossible to determine whether a system of maintenance and inspection was in place by reviewing a single log sheet. In the view of the plaintiff, the defendant cannot deny that it failed to have a reasonably adequate system, or failed to properly inspect, while refusing to provide the very evidence which speaks directly to the allegation.

[38] Although the daily logs may show that a system was not being properly maintained or implemented on previous days, this is not conclusive as to whether it was operational on the date of the accident. I am satisfied, however, that additional records are relevant to a determination of whether there was a system and whether that system was being carried out on the date of the fall. I note the comment of Drost, J. in *Ball v. British Pacific Properties Ltd.*, [1991] B.C.J. No. 3250 (B.C.S.C.), at p. 6 (QL) that "[p]roof of a regular system of business is *prima facie* proof that in a particular case the general system has been followed. From

evidence concerning a regular system or practice, it may be inferred that at the time in question that system or practice was being followed."

[39] I believe the scope of records requested by the plaintiff would result in a quantity of material whose lack of relevance and probative value would not justify requiring the defendant to produce it. The scope of production requested is simply overreaching, in view of the declining probative value of documents as they move away from the date of the accident. It is necessary to be mindful of the object of the *Civil Procedure Rules*, as stated at Rule 1.01: " the just, speedy, and inexpensive determination of every proceeding." However, the scope of relevance does capture material beyond what has already been produced.

[40] As such, it is my view that the defendant should produce additional daily logs for the period between May 1, 2006 and June 20, 2006, inclusive. This should be a sufficient basis of relevant evidence for the parties to address the question of whether a system was in place, and whether it was being followed, without permitting an expansive "fishing expedition." I also order the defendant to produce the monthly inspection report for May 2006. The daily log for June 20, 2006, standing alone, is not evidence of the existence of (or absence of) a

maintenance and inspection system. It is a report of the daily events of June 20 and no more.

[41] With reference to the post event records, i.e. records after June 20, 2006, I am of the view that without any evidence of a change in the manner in which the system was being maintained, requiring the defendant to produce those records would effectively sanction a “fishing expedition” to determine whether there was any such change. Without such evidence before me, the daily logs for these periods would not be relevant to any issue raised in the pleadings. There are no particulars of negligence alleged for any date after June 20, 2006.

Conclusion

[42] Accordingly, the defendant shall produce the additional daily logs for the period between May 1, 2006 and June 20, 2006, inclusive, and the monthly inspection report for May 2006.

[43] I would ask counsel to attempt to reach agreement on costs. However, should this not be possible, I invite written submissions within three weeks from the date of the release of this decision.

J.