SUPREME COURT OF NOVA SCOTIA
Citation: Neville v. Livingston, 2011 NSSC 252

Date: 20110622
Docket: SYD 292400
Registry: Sydney

Between:

JOSEPH NEVILLE

Plaintiff

v.

CHARLES LIVINGSTON

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	May 24, 2011 in Sydney, Nova Scotia
Written Decision:	June 23, 2011
Counsel:	Harvey M. MacPhee, QC., for the Plaintiff Guy LaFosse, Q.C. for the Defendant

By the Court:

[1] By Appearance Day motion filed May 2nd, 2011, the Defendant, Charles Livingston, sought disclosure of the following items from the Plaintiff, Joseph Neville:

1. A copy of Mr. Neville's file from Doctor Brian Roxburgh, Glace Bay Mental Health Clinic.
2. A copy of Mr. Neville's file from Sandy Burns, S.A. Burns Counselling Services.

[2] Production and disclosure is fundamental to the process of litigation and to the purpose of the Nova Scotia *Civil Procedure Rules* which is to promote a just, speedy and inexpensive determination of matters before the Court (Rule 1.01).

[3] This is evident when viewing Rule 14.08 which states that there is a presumption that full and complete disclosure will be given and is the norm.

Rule 14.08 (1) states as follows:

> "Making full disclosure of relevant documents, electronic information and other things is presumed to be necessary for justice in a proceeding."

Rule 14.08(2) states as follows:

> "Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party and to preserve the documents and electronic information."

[4] This presumption is one that is rebuttable but if a party intends to provide less than full disclosure of relevant information, the onus is clearly on that party to convince the Court that full disclosure ought not to be provided. Rule 14.08(3) states as follows:

> "A party who proposes that a Judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden and delay proportionate to both of the following:
>
> (a) The likely probative value of evidence that may be found or acquired if the obligation is not limited; and
>
> (b) The importance of the issues in the proceeding to the parties.

[5] Rule 14.08 (4) states the party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found and acquired if the disclosure obligation is not limited.

[6] Under Rule 18.18(4) a Judge may relieve a party or non party witness from a requirement to produce at discovery examination if the presumption is rebutted in accordance with Rule 14.08.

[7] In the present case Mr. MacPhee on behalf of the Plaintiff, Joseph Neville, submits a two fold argument:

(i) The information requested is not relevant and;

(ii) The information is of a sensitive and personal nature and not relevant to the motor vehicle accident in question.

[8] The disadvantage facing Plaintiff's counsel is that he has not seen the file to know what it contains and to consider the contents as it relates to his client's position. Not being in possession of the files the Plaintiff in it's brief stated:

> "I suppose I could provide an undertaking to use my best efforts to obtain a family doctor's file, but in this

> particular interest I don't believe I provided undertakings with respect to any of Mr. LaFosse's requests. I merely acknowledged those requests."

[9] Rule 15.02(1) (c), however states as follows:

> "A party to a defended action or contested application must do each of the following:
>
> (c) acquire and disclose relevant documents the party controls but does not actually possess.

[10] At the discovery held on June 29th, 2010 Mr. MacPhee, on receiving the request from Defendant's counsel Mr. LaFosse indicated he would take these requests "under advisement". Having done so and discussed the matter with his client, the Plaintiff's position is that the subject files (items 12 and 14 in the list of 16 items) need not be provided. For this reason then, relevancy becomes an issue for the Court to decide.

[11] The Defendant, in it's position, has provided an evidentiary basis to establish the relevance of the files requested. The Defendant submitted the following in it's submission, taken from the list of documents provided by the Plaintiff:

1. Notation of August 22, 2004 in the family doctor's notes indicating a history of depression by the Plaintiff.

2. Notation of October 10, 2004 in triage notes, Plaintiff taken to ER by police and expressed suicidal thoughts.

3. Notation of November the 3rd, 2004 in family doctor's notes, indicating anxiety, not sleeping well and intention to see Doctor Roxburgh the following week.

[12] The Defendant's position is that the Plaintiff's health before the accident is highly relevant in assessing the Plaintiff's claim for personal injuries and damages sustained in the motor vehicle accident which has now occurred six (6) years previous. The Defendant argues in it's brief that:

> "The Plaintiff was not working at the time of the accident and his pre-accident mental and physical condition could be highly relevant in terms of affecting his ability to return to work after this accident".

The Defendant further submits that at the discovery hearing the Plaintiff indicated he was seeing Mr. Sandy Burns for counselling in 2010. The Plaintiff argues that whether counselling was required as a result of any injuries suffered in the accident would be relevant. The Defendant argues that the proximity of the meeting with Doctor Roxburgh in November of 2004, it being just three (3) months prior to the accident is highly relevant. He argues that Mr. Neville may well have been treated

shortly before and after the accident. In support of it's position the Defendant refers to the Court to rules 18.13(1) and (2) which states as follows:

> "(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. (my emphasis)**
> (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. (my emphasis)**"

[13] As the matter here pertains to disclosure of files 18.13(2) is most relevant to the motion at hand. Rule 18.18(1)(b) appears also to be relevant. That rule states that:

> "A party may require a witness who is examined at a discovery to produce or provide access to a document or thing referred to by the witness but not brought to or accessible at the discovery unless the following applies:
>
> > (v) is not relevant and is not likely to lead to relevant evidence.

Rule 18.18(4), previously referred to in paragraph 6 herein states:

> "A Judge may relieve a party or non party witness from a requirement to produce or provide access at discovery examination if the party or witness rebuts the presumption for disclosure in accordance with Rule 14.08 or Rule 14- Disclosure and Discovery in General."

[14] The meaning of relevancy is defined in Rule 14.01 which states:

> "A Judge who determines the relevancy of a document or other things thought to be disclosed or produced must make the determination by assessing whether a Judge presiding at the trial or hearing of a proceeding would find the document, electronic information or other thing relevant or irrelevant."

[15] In my view the Plaintiff's position is insufficient to rebut the presumption of full disclosure to which I have referred. This presumption is critical to allowing any action or application to proceed in an appropriate manner.

[16] It may well be that the information required does not contain relevant information or information that would likely lead to relevant evidence. On this point, the process for disclosure provided for in the Order requested by the Defendant is entirely reasonable. It allows for and acknowledges that the Plaintiff or his Solicitor will provide to the Defendant's Solicitor "any and all relevant documents pertaining to this claim including the documents and materials listed in Schedule 'A'". Further the draft Order states at paragraph 2 that in the event the Plaintiff is unable to produce such documentation by a date certain, the Plaintiff will have to establish to the satisfaction of the Court that he had used his best efforts to obtain this documentation in a reasonable and timely fashion.

[17] It is not always possible for counsel to know whether information requested at discovery by opposing counsel will be relevant or somehow protected by privilege or is confidential. Ethically counsel are not in a position to provide undertakings they themselves are not capable of performing.

[18] This, however, does not relieve a party from compliance with the disclosure obligations under the rules to provide information that will lead or is likely to lead to relevant information. (See Rule 18.13(2))

[19] In the present case the state of mind of the Plaintiff on it's face would appear to be relevant, particularly so when it is so close in proximity to the date of the accident, which occurred in February of 2005. In addition, even if a Judge at trial would not find the information relevant disclosure is required if the file(s) would likely lead to relevant evidence. If it does not it will be up to the disclosing party to provide what information is relevant at that time or make a motion to limit disclosure or seek directions from the Court. If necessary such a motion could include a ruling on relevancy.

[20] At the present time however, the Plaintiff shall be required to acquire and disclose the files of Doctor Roxburgh and Mr. Burns to the Plaintiff and I so Order. It is not the Court's function to anticipate further motions which may become necessary as the matter unfolds. For these reasons the files requested in the appearance day notice filed by the Defendant shall be disclosed by the Plaintiff to the Defendant within 45 days of this Order being issued.

[21] The Defendant shall be awarded costs in the amount of $300 payable in the cause.

J.