

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Shaw v. J.D. Irving Limited*, 2011 NSSC 487

Date: 20111229
Docket: Pic No. 274457
Registry: Pictou

Between:

David Shaw

Plaintiff

- and -

J.D. Irving Limited

Defendant

Judge: The Honourable Justice N.M. Scaravelli

Heard: December 29, 2011, in Pictou, Nova Scotia
Via Teleconference

Oral Decision: December 29, 2011

Counsel: Nicolle A. Snow, solicitor for the plaintiff
Christopher Madill on behalf of Patricia Mitchell, solicitor
for the defendant

Orally by the Court:

[1] This action is scheduled for trial commencing January 30, 2012.

[2] The defendant has brought a motion to redact that portion of the plaintiff's physician narrative contained in a report to another treating physician, dated June 2005, containing opinion evidence as follows:

Clinically, it seems he has carpal tunnel compression of his right dominant hand. My personal opinion is that this is secondary to the swelling and immobilization of this hand, caused by the accident, and carpal tunnel could have certainly been either initiated or worsened by it. I would like your opinion on this. [emphasis added]

[3] The defendant's motion further seeks an order declaring the medical report of the treating physician, dated June 2, 2010, inadmissible. A date assignment conference was held on November 5, 2010. The finish date was set at November 3, 2011. On November 14, 2011, the defendant received a medical report prepared by the treating physician, Dr. Skanes, dated June 2, 2010. The plaintiff inadvertently failed to disclose the report prior to the finish date. This report is self-described as a medical/legal type report and states in part:

He never did regain full extension excursion of his middle or fourth fingers. The swelling and therapy led to carpal tunnel syndrome and subsequent surgical release which was complicated post-operatively by a fall causing the wound to open slightly. This went on to result in long term swelling and pain which improved with physiotherapy to the point that he is not bothered during light activities, but heavy activities as outlined above do cause him significant discomfort that can last two days. [emphasis added]

[4] *Civil Procedure Rule 55* governs rules relating to the filing of expert reports and physician narratives.

[5] Mandatory time lines are imposed on expert report, specifically six months before finish date with rebuttal reports three months before finish date. There is no automatic right to oral discovery of an expert. Written questions are permitted within 30 days of delivery of the expert report, and the expert has 30 days to respond. Supplemental questions can only be asked with the leave of the court.

[6] Rule 55.04 sets out mandatory contents for expert reports. The expert must make detailed representations to the court. The report must include detailed information in support of the opinion as well as detailed information required in order for the court to assess the weight to be given to the opinion.

[7] Rule 55.14 distinguishes between an expert's report and a treating physician's narrative. The narrative is confined to "the relevant facts observed and findings made, by the physician during treatment". No discovery of any kind is permitted including written questions. The rule limits the scope of the physician's testimony at trial.

[8] Rule 55.14(6) provides for the exclusion of expert opinion evidence of a treating physician who provided a narrative instead of an expert's report, unless the party offering the evidence satisfies the court that the other party received the opinion and the material facts upon which it is based, sufficient for the other party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination.

[9] Rule 55.15(1) provides for an advanced ruling by the court as to whether narratives provide sufficient information to permit a treating physician to testify to an opinion contained in a narrative.

Physician's Narrative Dated June 2005

[10] The defendant submits Rule 55.14 was not intended to allow physician narrative opinion evidence on causation. Further, the opinion expressed is somewhat equivocal.

[11] Rule 55.14 does not make any distinction as to contents of opinion expressed by expert as opposed to physician narrative. The test is whether sufficient information exists in terms of relevant facts observed and findings made that permit opinion evidence to be contained in physician narratives.

[12] The physician narratives were delivered to the defendant in March of 2008. The physician's notes, as well as her report to Dr. Harper, were made during the course of treatment and not in the context of litigation. Her notes disclose relevant facts observed and findings relating to carpal tunnel compression. In my view, her notes contain sufficient information to support her opinion that carpal tunnel could have been either initiated or worsened by the accident. Dr. Skanes will be subject to cross-examination regarding her notes and opinion, including her degree of certainty. Whether a causal connection has been established by this evidence is for the court to decide at trial.

June 2010 Report

[13] This report is identified as a “medical/legal type report” and responds to requests from plaintiff’s counsel for a medical/legal type report. This report was provided in the context of a pending trial and not within the context of a physician’s narrative during treatment. Moreover, the report delivered to the defendant 10 weeks prior to trial is unequivocal as it relates to causation. Under the circumstances, I do not view this report as a physician narrative. To admit this report into evidence would, in my view, circumvent the rule relating to expert opinion. As a result, the report containing expert opinion fails to comply with Rules 55.03 and 55.04 relating to mandatory time lines for filing and contents.

[14] Accordingly, the court will allow the physician narrative, dated June 2005, containing opinion evidence, and exclude from evidence the medical report dated June 2010.

[15] Costs will be in the cause.