SUPREME COURT OF NOVA SCOTIA
Citation: *Gale v. Purcell*, 2018 NSSC 318

Date: 20180510
Docket: Hfx. No. 413709
Registry: Halifax

Between:

Angela Marie Gale

Plaintiff

v.

George D. Purcell

Defendant

LIBRARY HEADING

DECISION
MID-TRIAL MOTION ON ADMISSIBILITY OF EXPERT OPINION

Judge:	The Honourable Justice Christa M. Brothers
Heard:	May 8, 9, 10, 14, 15, 2018 June 12, 13, 14, 2018 Halifax, Nova Scotia
Oral Decision:	May 10, 2018
Written Decision:	December 14, 2018
Subject:	Motion to determine admissibility of expert opinion evidence outside Rule 55 reports
Summary:	[1] The rule concerning the admission of expert opinion evidence has been strictly construed by this Court. This does not remove the parties' ability to reach agreements on admissibility in an effort to streamline the court process in the spirit of the just, speedy, and inexpensive determination of

issues. Having made concessions and reached agreements that expressly or implicitly dispense with strict compliance with the *Civil Procedure Rules*, one party cannot later seek strict compliance with the Rules.

Issues: Should opinions contained outside an expert's Rule 55 report be admitted at trial?

Result: Opinions admitted. In the unique circumstances of this matter, the opinions are admitted.

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Oral Decision:	May 10, 2018
Written Release:	December 14, 2018
Counsel:	Peter C. Rumscheidt and Nicole Power (Articled Clerk), for the Plaintiff Chad G. Horton and Joshua E. Martin, for the Defendant

Brothers, J:

Overview

[2] The rule concerning the admission of expert opinion evidence has been strictly construed by this Court. This does not remove the parties' ability to reach agreements on admissibility in an effort to streamline the court process in the spirit of the just, speedy, and inexpensive determination of issues. Having made concessions and reached agreements that expressly or implicitly dispense with strict compliance with the *Civil Procedure Rules*, one party cannot later seek strict compliance with the Rules.

Background

[3] The parties to this litigation participated in a pre-trial telephone conference on April 27, 2018. At that time, the Court canvassed whether there were any pre-trial issues to be discussed or determined. In the context of discussing the proposed Joint Exhibit Book, the Court specifically inquired if there were any anticipated objections to the admissibility of documents. Counsel confirmed that they had discussed the issues and there were no issues concerning admissibility. Counsel also confirmed that discussions resulted in an agreement concerning the admission of evidence in the Joint Exhibit Books. In addition, the parties agreed what use the Court could make of such evidence.

[4] It was not until May 9, 2018, the second day of trial, that the Defendant, for the first time, raised admissibility issues concerning opinions found in documents contained in the Joint Exhibit Books.

[5] Dr. Alexander J. Clark provided an expert report pursuant to Civil Procedure Rule 55, dated December 1, 2016. On January 26, 2018, Dr. Clark provided a further letter commenting on Dr. Edvin Koshi's report of August 29, 2017. Neither of these were challenged by the Defendant as inadmissible Rule 55 expert reports.

[6] This is my decision on the issue of the admissibility of expert opinions provided by Dr. Clark, as contained in an August 16, 2017, Morneau Shepell form

(the "Morneau Shepell Form") and a letter from Dr. Clark addressed to Morneau Shepell, dated September 26, 2017 ("the Clark Letter").

[7] The Court is left to rule on the admissibility of portions of two documents. The first are statements contained in the Morneau Shepell Form under No. 1, which state:

> Myofascial Pain Syndrome – (L) Trapezius Muscle + Low Back

[8] Secondly, the following comments appear on the second page of the Morneau Shepell Form under No. 6:

> I anticipate she will continue (illegible) above noted treatment on a recurrent basis. The chance of returning to full-time work is less than 5%. Symptoms will be permanent.

[9] Lastly is the Clark Letter. The impugned sections of this letter are as follows:

> Ms. Gale is only able to work part time due to her disabilities caused by a motor vehicle accident in 2010 involving her left shoulder and her low back.
>
> …
>
> Due to the increased pain, Ms. Gale may work only 2 days per week instead of 3.

[10] Dr. Clark's chart notes from the pain clinic were included in the Joint Exhibit Book. The Defendant initially sought an admissibility determination with respect to purported opinion evidence of Dr. Clark and whether the purported opinion evidence is admissible as a physician's narrative pursuant to Civil Procedure Rule 55.14. The Defendant identified four excerpts from the pain clinic chart notes which he argues do not comply with Rule 55.14. These excerpts are as follows:

> Page 260 - 'Her symptoms were further worsened by a second motor vehicle collision in which she was again rear ended in 2009 [sic]'
>
> Page 261 - 'This is all secondary to her traumatic MVCs x 2'.

> Page 294 - '…In Ms. Gale's situation this is actually a reasonable thing to do. The only time that we would get involved with prescribing marijuana for medical purposes is if her family physician is not comfortable initiating a trial of medical marijuana, but is willing to take over prescribing at a later date if it is successful. In this situation, I would be prepared to initiate Ms. Gale with marijuana for medical purposes, particularly cannabis oil if you are not comfortable doing this, otherwise, I will leave it in your hands. Another alternative would be to refer her to one of your clinics.'
>
> Page 299 - 'It would be my recommendation that she go to physiotherapy to work on the tendonitis of her left shoulder, as well as her range of motion. I think she could also have her low back assessed, to be given some exercises to do in order to try and help her manage her back pain more appropriately.'

[11] Other than the four excerpts, the Defendant was agreeable to the Plaintiff relying on opinions in the pain clinic chart notes as physician's narratives.

[12] The Plaintiff conceded that the opinions contained in the identified excerpts above should not be admitted and withdrew her request to have the Court rule on the objection. This left the admissibility of expert opinion evidence contained in the Morneau Shepell Form and Clark Letter as the only remaining issues.

Defendant's Position

[13] The Defendant argues the opinions found in the identified documents neither constitute a Rule 55 expert report nor a Rule 55.14 treating physician's narrative.

[14] On May 9, 2018, the Defendant initially argued that portions of the Morneau Shepell Form and the Clark Letter should be found inadmissible and non-compliant with Rule 55.04. The Defendant articulated his position in a brief of May 9, 2018, wherein the Defendant expanded his objections to those reports and stated:

> Upon consideration, the Defendants objects [sic] to the [sic] Tabs 77/79 in their entirety.

[15] After filing the brief at 8:00 p.m. on May 9, the Defendant articulated his position in oral argument on May 10, 2018.

[16] The Defendant argues that both documents do not constitute a Rule 55 report nor a Rule 55.14 physician's narrative report.

[17] The Defendant argues that the Morneau Shepell Form was not generated for therapeutic treatment but to assist the Plaintiff to obtain workplace accommodation. The Defendant relies on ***Halliday v. Cape Breton District Health Authority***, 2017 NSSC 201, for the argument that this report does not contain an opinion concerning patient care but contains opinions beyond treatment and therefore must comply with Rule 55.04

[18] As for the Clark Letter, the Defendant argues that Dr. Clark provided a Rule 55 report dated December 1, 2016, followed by an update on August 9, 2017. The Defendant argues that Dr. Clark should not be permitted to supplement his expert opinion through the "back door" in contravention to Rule 55.14 when Dr. Clark had the opportunity to provide an addendum or update and never did.

Plaintiff's Position

[19] The Plaintiff argues that the opinions were produced well in advance and the Defence did not raise admissibility issues. Secondly, the Plaintiff argues there was an agreement that the opinions were admissible and the author would be at trial and subject to cross-examination.

Analysis

[20] The Plaintiff submits that the production of the Morneau Shepell Form and Clark Letter occurred on December 11, 2017 when counsel for the Plaintiff sent a letter concerning several issues, including:

1. The form and compliance of Dr. Clark's Rule 55 report;
2. Agreement to extend, by consent, the deadline for the Plaintiff to file Dr. Clark's expert report;
3. Dr. Sarah Seaman's anticipated expert report and the extension of the deadline for that report;
4. Whether the forms and letters written by Dr. Clark and Dr. Seaman could be agreed to be admitted at trial as evidence.

[21] The Clark Letter is referenced as an attachment to this letter. The Morneau Shepell Form is not specifically referenced, but, in response to questions from the Court, Plaintiff's counsel indicated that both documents were disclosed under cover of a letter dated December 11, 2017. This was not challenged by the Defendant.

[22] In the letter of December 11, 2017, counsel for the Plaintiff advised the Defendant of her intended reliance on the opinions contained in the impugned documents:

> With respect to the other attached forms/documents as completed by Dr. Clark and Dr. Seaman, in our submission these are simply updates/supplemental information to the comments and opinions contained in Dr. Clark's December 1, 2016 report and Dr. Seaman's attached report. Please review matters with your client and advise with respect to its position on these records being entered as evidence at the trial.

[23] In response, counsel for the Defendant wrote to counsel for the Plaintiff under cover of letter dated January 10, 2018, and addressed the various topics outlined in the letter of December 11, 2017. In particular, the Defendant's counsel:

1. indicated there were no issues concerning the timeliness of Dr. Clark's report;
2. provided agreement to extend the deadline; and
3. indicated that the defence was not requiring strict compliance with the *Civil Procedure Rules*.

In fact, the Defendant noted that their own expert's report was out of time if strict compliance with the Rules was enforced.

[24] Lastly, in relation to the admissibility of the Morneau Shepell Form and Clark Letter, the Defendant's counsel states in the letter of January 10, 2018:

> You are free to seek to introduce the additional evidence in the normal course.

[25] There were no objections raised by the Defendant to the opinions contained in the Morneau Shepell Form nor to the Clark Letter prior to May 9, 2018, the second day of trial.

Agreement and Admission of Evidence

[26] At the outset of trial, counsel proffered five bound volumes identified as a three-volume Joint Exhibit Book, a Supplemental Exhibit Book, and a second Supplemental Exhibit Book. These were marked Exhibits 1-5. Two agreements were reached by counsel in relation to the documents contained in these Exhibits.

1. The documents contained in the five volumes are admitted for the fact that observations or statements were made but not for the truth of the contents;
2. Opinion evidence contained in the five volumes is limited to Dr. Clark, Dr. Seaman and Dr. Koshi, all of whom provided Rule 55 expert reports.
3. In addition to the bound Joint Exhibit Books were two loose exhibits: Exhibits 6 and 7, which were admitted by consent with the same above-noted caveats.

[27] The Plaintiff also relies upon a letter from counsel for the Defendant dated January 10, 2018, which acknowledges the impugned documents, being the Morneau Shepell Form and the Clark Letter.

Legal Principles

[28] Rule 55.04 articulates the formal and comprehensive requirements which must be met before a report containing expert opinion evidence can properly be admitted at trial or a hearing:

> 55.04 (1) An expert's report must be signed by the expert and state all the following as representations by the expert to the court:
>
> (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
>
> (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
>
> (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
>
> (d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;

(e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

(a) the expert's relevant qualifications, which may be provided in an attached resumé;

(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;

(c) reference to all publications of the expert on the subject of the opinion;

(d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

(e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

Rules to be Strictly Construed

[29] I make this decision having reviewed the caselaw and understanding the onus on the Plaintiff when admitting the opinion into evidence. The law is clear that the Rules should be strictly construed so as to avoid any circumvention of

Rule 55.04. I appreciate that the burden is on the Plaintiff and I am satisfied that there has been no circumvention here.

[30] The Defendant referred the Court to several cases, including ***Halliday, supra, Bruce v. Munroe***, 2016 NSSC 341, ***Naugle v. Cleary (Trustee of)***, 2016 NSCA 56, and ***Warnell v. Cumby***, 2016 NSSC 356. These cases are distinguishable and do not speak to the issues raised in this matter.

[31] ***Halliday, supra*** deals with treating physicians' narratives under CPR 55.14. The Plaintiff sought to introduce the contents of a treating physician's medical file as a treating physician's narrative. This case and the line of authorities pre-dating it such as ***Russell v. Goswell***, 2013 NSSC 383, and ***Shaw v. J.D. Irving Ltd.***, 2011 NSSC 487, are not applicable to my considerations.

[32] The Plaintiff here is not seeking to admit the opinion contained in the two impugned documents as treating physician narratives but instead is arguing that the opinions contained in those documents are supplemental to the Rule 55 expert opinions already filed. Furthermore, the Plaintiff has argued that there was an agreement to admit these opinions via correspondence between the parties concluding with the letter from the defence in January 2017. Even if that letter is not considered evidence of an agreement, then agreement concerning the joint exhibit books ends the debate.

[33] The factual circumstances before me are vastly different from the particular circumstances that underpin the decisions relied on by the defendant.

[34] In ***Bezanson v. Sun Life Assurance Co. of Canada***, 2015 NSSC 1, the Plaintiff tendered a copy of a family physician's entire file and argued that the entire contents were admissible for the truth of the opinion and as a business record without the need to have the physician testify. The Court ruled that such documents containing opinion were not admissible for the proof of the truth of the opinion without the evidence being admitted through a qualified expert. In reaching this decision the Court stated the following, which is instructive.

> **31** *Ares v. Venner* continues to stand for the proposition, in my view, that some simple observational opinions might be permitted to stand in business records. It should be noted that even lay persons are often permitted to opine in areas of common human experience (such as a person's temperature ("warm to touch"), color ("flushed"), mood ("angry"), and so on). But a true opinion, given by a person within their area of special expertise, is not and could never be a business record. In particular, where the medical opinions are crucial and of utmost

> importance to the case, as they would be here, the Court needs to be assured of their reliability. Such opinions must be brought forward to the Court by their authors, defended, and properly tested by cross-examination.
>
> 12 Documentary evidence is not *viva voce* evidence. A litigant cannot simply produce a document for the Court, have it marked, and call it a day. Any document that is tendered to a court must be tendered by way of some process that makes it admissible (unless entered by consent). Documents are often tendered by witnesses, a process that often depends on the nature of the document and the reason for its introduction. For example, where a person wishes to introduce a document that they merely received, as proof that they received it; that is perhaps not a complicated matter. Where, on the other hand, a document is being introduced *for the truth of its contents*, its admissibility must be carefully considered.
>
> 13 In the present case, to put it most succinctly, the difficulty arises specifically because the affected documents contain opinion. Opinion evidence is subject to its own special rules, the most basic of which involve the author of the opinion needing to be properly qualified, to introduce his opinion, and to be available for cross-examination. These rules relate to admissibility as well as to weight.

[35] There is nothing about these particular circumstances that run afoul of the Court's jurisprudence. I have decided to allow the introduction of the impugned opinion, contained in both documents. My decision is based on the following considerations:

(1) The Plaintiff disclosed the Morneau Shepell Form and the Clark Letter on December 11, 2017 and also disclosed the fact that she was seeking to rely on those opinions.

[36] The Defendant was put on notice that the Plaintiff was seeking to rely on the opinions contained in the Morneau Shepell Form and Clark Letter as supplemental opinions to the Rule 55 Report without the need to author a supplemental report. The Defendant provided what could be construed as at best, an ambiguous response. At no time prior to the second day of trial did the Defendant state that he did not agree to the admissibility of opinions contained in those documents. Furthermore, the Defendant's position at the pre-trial telephone conference was seemingly agreeable.

[37] The Defendant argued that the last sentence of the letter of January 10, 2018, meant that any opinion the Plaintiff sought to introduce should have been confined

to the expert's Rule 55 Report. The difficulty is that this sentence does not expressly say that, and the Defendant's position in relation to the Joint Exhibit Books did nothing to clarify the issue.

[38] I accept the submission that there is no onus on the Defendant to speculate as to what evidence the Plaintiff seeks to introduce as opinion evidence. Instead, the onus is on the Plaintiff to identify the opinion evidence she wishes to introduce at trial. However, I find that the Plaintiff did just that, and met that onus in the letter of December 11, 2017.

[39] Dr. Clark authored a Rule 55 Report which, in some respects, mirrors the comments in the impugned documents. The Defendant has noted some differences, upon which I will further elaborate. I conclude that these are distinctions without a difference. To repeat, the impugned portions of the Morneau Shepell Form are:

> Myofascial Pain Syndrome – (L) Trapezius Muscle + Low Back
>
> I anticipate she will continue with (illegible) above noted treatment on a recurrent basis. The chance of retraining for fulltime work is less than five percent. Symptoms will be permanent.

[40] The impugned portions of the Clark letter are:

> Ms. Gale is only able to work part time due to her disabilities caused by a motor vehicle accident in 2010 involving her left shoulder and her low back.
>
> …
>
> Due to the increased pain, Ms. Gale may work only two days per week instead of three.

[41] Dr. Clark's Rule 55 Expert Report dated December 1, 2016, provides the same opinions as appear in the Morneau Shepell Form and Clark Letter. Dr. Clark states in his report that:

(a) Ms. Gale has myofascial pain syndrome;

(b) Ms. Gale will continue to need treatment modalities in the future.
(c) Ms. Gale is very unlikely to return to full-time employment given she has had symptoms for more than six years. If a patient has not been able to work because of pain for at least two years, the chance of returning to full time employment is less than five percent.
(d) Her symptoms will continue to be permanent.
(e) Given symptoms, physical findings and the need for injections, it is very unlikely that Ms. Gale will be able to work full time in a position that involves use of upper body.

[42] The only opinion that appears in the impugned documents that does not appear in the expert report is the last sentence of the Clark letter which gives the opinion that, due to pain, the Plaintiff may work only two days per week instead of three. This contrasts with a statement in the expert report which says:

> I am not able to provide an opinion as to how many hours she can work per week as I am not an expert in functional capacity evaluations and do not perform this type of evaluation.

[43] I accept the Defendant's argument that this portion of the Clark Letter relating to the duration of time the Plaintiff is able to work is, on its face, different than the opinions expressed in Dr. Clark's Expert Report. Despite this, it is too late for the Defendant to change his position on the admission of this opinion. I base my conclusion on the following:

1. Disclosure by the Plaintiff;

2. The clear request for the opinion to be considered as supplemental to the Expert Report, without the necessity of providing a supplemental report;
3. The contextual background of agreements reached by the parties to not strictly comply with the Civil Procedure Rules on other issues;
4. The ambiguous response in the Defendant's letter of January 2017; and
5. The agreement concerning the Joint Exhibit Book.

[44] Counsel addressed the agreement concerning the Joint Exhibit Books and argued that the agreement was that only opinion evidence contained in the Rule 55 Expert Reports of Drs. Clark, Seaman, and Koshi would be admitted. However, this is not actually what counsel articulated on the record at the pre-trial telephone conference, or at the commencement of trial. At the pre-trial telephone conference on April 28, 2018, the following exchange occurred:

> The Court: I notice that there's potentially a three-volume Joint Exhibit Book. Are there going to be any preliminary motions about objections to admissibility or qualifications of experts?
>
> Mr. Rumscheidt: Mr. Horton and I actually spoke this morning about that. We'd already talked about it. I guess the short answer is no. We've done a fair bit of consultation to make sure what's in the book is there by consent so in terms of admissibility, no. And I can advise Your Ladyship I noted a few bits and pieces that I missed so we've got a supplementary Joint Exhibit Book and then there's a second supplementary book that Mr. Horton has prepared with a bunch of documents regarding a human rights complaint which he and I hadn't quite got our heads around where that would fit when I completed the first original joint book. So the only commentary or, I guess, qualifications with respect to the book are with respect to the use of some of the evidence by the Court. There's a lot of medical charts. Not all of the authors of those charts are being called as witnesses and we are limited to the three experts and I'll . . . have acknowledged to Mr. Horton that some of the charts of the non-Rule 55 experts, some of the materials do include opinions, so we'll be confirming on the record, I guess at the start of the trial, that any opinions expressed by healthcare people other than the three Rule 55 experts, I am not looking to have those opinions admitted as treating physician narrative opinions or in any way seeking the Court rely on those opinions. The non-Rule 55 medical materials . . . they're use would be limited to the observations or . . . the recording by the health care professionals' information provided to them by Ms. Gale to where does it hurt, what areas of the body were treated, as well as the dates of treatment.
>
> The Court: Okay, so we'll deal with that on the record on Tuesday. In terms of this additional book that Mr. Horton proposes, Mr. Rumscheidt, I take it that you're objecting to that being introduced.
>
> Mr. Rumscheidt: No, sorry My Lady, I didn't mean to . . . No, I am not objecting to the admissibility. I think the bulk of the occasions when that book will be referenced might be during cross-examination of Ms. Gale and I am just going to preserve, on a piece-by-piece basis, the right to object depending on the specific use to which Mr. Horton might wish to file that. I am not sure if he was going to be asking Your Ladyship to just accept the entire contents of that book even if it's not referred to during anybody's cross-examination. To further Mr. Horton in terms of the use to which he might be intending to put that material in the human rights exhibit book, if I can call it that.

Mr. Horton: Like the non-expert, clinical evidence that Mr. Rumscheidt just discussed, the intention would be for the fact that observation or statements were made, but certainly not for the truth of the contents. He is correct - I anticipate that it will largely be brought to bear during cross-examination and then how the evidence unfolds, specific authors of certain documents may be called as witnesses and they can testify as necessary.

The Court: Okay, so we'll deal with those issues as they arise, Mr. Rumscheidt?

Mr. Rumscheidt: That's fine.

The Court: Mr. Horton, any issues with regards to admissibility or preliminary issues that we should discuss in terms of timing of those issues being dealt with at the beginning of trial if they can be, or anything anticipated?

Mr. Horton: No, nothing beyond . . . what we've already discussed.

[45] On the first day of trial, May 8, 2018, the following exchange took place:

Mr. Rumscheidt: . . . I've had discussions with my friends in terms of just . . . as we mentioned at the telephone conference a week or so ago, we have a number of joint exhibit books that we've agreed to. So I'm at Your Ladyship's discretion. We've got five bound volumes. The first three are titled 'Joint Exhibit Book Volumes 1, 2 and 3". Then we have an initial Supplemental Joint Exhibit Book and then, finally, a second Supplemental Joint Exhibit Book. It doesn't matter to counsel whether the initial three volumes are Exhibit 1 - three volumes within it - or whether it's Exhibits 1, 2 and 3.

The Court: And then the others 4 and 5?

Mr. Rumscheidt: Be either 4 and 5 or 2 and 3. I don't know if it matters.

The Court: First I should say everything in these exhibit books are coming in by agreement?

Mr. Rumscheidt: They are, My Lady. We've had some discussions in terms of the use to which the Court, Your Ladyship, can put them. I'll defer to Mr. Horton on that.

Mr. Horton: If Mr. Rumscheidt would indulge me for a moment. So we have corresponded on the purpose for which this evidence is being admitted and two points were agreed upon in correspondence. The documentary evidence contained in those five volumes will be admitted for the fact that observations or statements were made but not for the truth of the contents. And, secondarily, opinion evidence shall be limited to Dr. Alexander Clark, who is an anesthesiologist, Dr. Sarah Seaman, who is a family physician, and Dr. Edvin Koshi, physiatrist, all of whom have produced Rule 55 reports and who will be made available to testify.

The Court: So right now, as the documents exist, the Defendant's position is that any observations, comments, etc. go in just for the fact that they're made - not for the proof of the truth of the contents unless they're proved through a witness. Is that . . .

Mr. Rumscheidt: Yes, I know Ms. Gale is going to be speaking to a lot of it but I think that is a fair summary.

Mr. Horton: Yes. The fact that those observations or comments were made but the truth of the contents will be proved . . .

The Court: Okay, still remains to be proved. Okay and if there's any other opinions given in any of the documents outside of Clark, Seaman and Koshi, what's the position of the Plaintiff on that? The Defendant says no opinion evidence is admitted in terms of what's in those documents other than what's proven by those three through their Rule 55 evidence. What's the Plaintiff's position on that?

Mr. Rumscheidt: We acknowledge that those are the three Rule 55 experts and that the others are not treating physician narrative reports.

The Court: Okay. And so is there some thought that at the end of the trial if some documents haven't been proven, they'll be removed or everything's going to stay in subject to . . .

Mr. Rumscheidt: I don't think we've had any specific discussion on that. That has crossed my mind because I know certainly we're not going to touch on every single page through the witnesses and I'm alert to that possibility and I would probably want to speak to that at the end of the evidence to see what hasn't been addressed by a witness and whether . . . my friend speaks of observations and things taking place. Our discussions have largely been in the context of the massage therapists, the chiropractors, the physiotherapist saying, 'Ms. Gale was here today. She complained about this' and those are the observations, but there's other material that isn't of that type.

The Court: So that remains to be seen. We'll address that in submissions at the end.

Mr. Rumscheidt: Yes . . .

The Court: So that's a possibility.

Mr. Rumscheidt: . . . that would be my request.

The Court: Mr. Horton?

Mr. Horton: If I may, My Lady, my position and understanding on that particular issue is that the entire contents of the consented to Joint Exhibit Books remain in evidence subject to the caveat today, that I stated a moment ago.

Mr. Rumscheidt: And I'm only hesitating, My Lady, because I think I'm okay with it and it's hard to do in the abstract until some specific document until my

> friend or the defendant says 'this is what it says and therefore it's true', where no witness has ever spoken to it, at this point my understanding is that that's not open necessarily. Again, it's hard to do in the abstract.
>
> The Court: I understand. So this may become an issue. It may not be an issue, but . . .
>
> Mr. Rumscheidt: I anticipate that as we get through specific examples, we may need to get the direction of the Court on that matter.
>
> The Court: Mr. Horton, anything further?
>
> Mr. Horton: No, My Lady.

[46] It is the Plaintiff's obligation to disclose and advise of the reliance on opinion evidence. The Plaintiff also has the burden to prove they did so. I am satisfied the Plaintiff did so.

[47] The Defendant argues that the Rules must be complied with. This is correct, but advising of admissibility issues in advance and not surprising the other party are also part of the fabric of the *Civil Procedure Rules*. Moreover, I am mindful of the object of the Rules – the "just, speedy, and inexpensive determination of every proceeding" (Rule1.01) – and of the power to excuse compliance in the event of a failure to comply with a rule (Rule 2.02). I also note Rule 2.02(3)'s statement that it "is not in the best interest of justice" to set aside a step in a proceeding or, *inter alia*, a document where there has been undue delay in raising the issue, or where the party has taken "a fresh step in the proceeding knowing about irregularity."

[48] Lastly, I cannot find any prejudice to the Defendant in admitting these opinions. The opinions were disclosed and discussed. Dr. Koshi had the opportunity to review these opinions and provide his own opinions. In contrast, the Plaintiff would be left with no ability to refer to these opinions despite having disclosed them and having clearly sought the Defendant's agreement to rely on those opinions in the form they are in.

[49] While not a remedy in all cases, the fact that the expert is attending to be cross-examined is a relevant consideration in these circumstances. The particular circumstances that elevate the availability of the author for cross-examination is the fact that there was ostensible agreement to the admission of these opinions, and that the opinions are, in all but one case, the same as those opinions contained in the expert report provided.

[50] This decision on these particular facts will not dilute Rule 55 and create a floodgates situation, as argued by the Defendant. These are unique circumstances where I have made a finding of fact that the Defendant actually entered into an agreement for the admission of these opinions.

[51] This leaves the Defendant still able to argue weight so that, while these opinions are admissible, I will hear from counsel at the end of the trial as to what weight should be placed on them.

Brothers, J.