SUPREME COURT OF NOVA SCOTIA
Citation: *Ogilvie v Windsor Elms Village for Continuing Care Society*, 2019 NSSC 349

Date: 20191113
Docket: Ken No. 406961
Registry: Kentville

Between:

Sharon Ogilvie

Plaintiff

v.

Windsor Elms Village for Continuing Care Society

Defendant

Judge:	The Honourable Justice John A. Keith
Heard:	November 13, 2019, in Windsor, Nova Scotia
Counsel:	Sharon Cochrane, counsel for the Plaintiff
	Blair Mitchell, counsel for the Defendant

By the Court:

INTRODUCTION AND ISSUE

[1] This is a motion brought by the Defendant on the first day of trial for an advance ruling as to whether certain documents identified by the Plaintiff satisfy Rule 55.14 for a physician narrative. For clarity, this is not a motion to determine the admissibility of the proposed opinion.

[2] While the motion is brought by the Defendant, it is agreed that the Plaintiff is the party seeking to introduce these documents as an exception to the rule on opinion evidence and thus bears the burden of proving that the treating physician narrative exception under Rule 55.14(6) applies. In addition, given the timing, I released an oral "bottom line" decision with reasons to follow. These were my reasons.

FACTS

[3] This motion was made at the beginning of trial before I had heard any evidence. This decision should, therefore, not be considered to have determined any facts which are material to the underlying causes of action except where specifically stated.

[4] It is agreed between the parties that the Plaintiff's employment with the Defendant was terminated without cause on May 24, 2012. At that time, the Defendant offered the Plaintiff severance by way of working notice, among other things.

[5] The Plaintiff alleges that she was unable to return to work for medical reasons. The primary explanation offered by the Plaintiff related to stress and anxiety.

[6] It is further agreed between the parties that the Defendant subsequently terminated the Plaintiff's employment on July 30, 2012. For the purposes of this motion, it is not necessary to delve into the details that gave rise to the July 30, 2012 termination except to say that:

1. The Defendant states that the facts leading up to July 30, 2012 fully justified the decision to terminate the Plaintiff's employment as of July 30, 2012.

2. The Plaintiff disagrees and points to, among other things, her health during that period of time between the original termination without cause on May 24, 2012 and the termination with cause on July 30, 2012. During that material time period, Dr. Viji Nathan was the Plaintiff's family physician and:

    a. Saw the Plaintiff at her office a number of times during scheduled appointments. Dr. Nathan kept a record of these visits as part of handwritten, internal chart notes. These chart notes were delivered to the Defendant in November, 2014 as part of the normal disclosure process; and

    b. Signed four notes or forms for the Plaintiff, some of which were delivered directly to the Plaintiff. One of these four documents was a form bearing the Defendant's logo and entitled "Attending Physician's Report". Three of these four documents (including the "Attending Physician's Report") were in the possession of the Defendant when the litigation commenced. The fourth document in the External Notes category was disclosed by the Plaintiff in November, 2014 as part of the normal disclosure process.

[7] On September 14, 2012, the Plaintiff commenced this action for wrongful dismissal. Paragraph 7 of the Statement of Claim alleged that "The Plaintiff, who has a history of stress related illness, which history was known to [the Defendant's CEO], suffered an adverse reaction to the news of her termination and was placed on stress leave by her physician, Dr. Viji Nathan, on June 7, 2012." Paragraph 17 confirms the delivery of an "Attending Physician's Report" completed by Dr. Nathan which "advised that the Defendant continued to suffer from a stress-related illness and that the prognosis for recovery was poor."

[8] The Date Assignment Conference occurred on October 25, 2018. The following topics of discussion and deadline are germane:

1. The Plaintiff indicated her intention to call Dr. Nathan as a witness and that an expert report from Dr. Nathan would comply with Rule 55.04. In other words, while the Plaintiff confirmed an intention to call Dr. Nathan, she did not say that she would be filing a treating physician's narrative under Rule 55.14;

2. The Finish Date was fixed as August 13, 2019 at which time, among other things, witness lists were due;
3. The Trial Readiness Conference was scheduled for September 13, 2019; and
4. The trial itself was scheduled to begin on November 13, 2019.

[9] The Plaintiff did not file a Rule 55.04 report in accordance with the Rules. At some point in time, the Plaintiff decided to rely upon the physician's narrative exception under Rule 55.14. The evidence is not clear as to precisely when the Plaintiff made this decision. It appears, however, to have been prior to the Finish Date on August 13, 2019 as Dr. Nathan was included on the Witness List filed with the Court and delivered to the Defendant.

[10] The issue of the treating physician's narrative was subsequently discussed during a pre-trial conference which I, as trial Judge, convened on September 13, 2019. The Defendant states, and it seems clear, that this was the first time the issue was directly communicated by the Plaintiff to the Defendant.

[11] During this pre-trial conference, I indicated that I would be prepared to hear a motion addressing any issues regarding the physician's narrative.

[12] After this pre-trial conference, discussions ensued between counsel, without the Court's involvement. Those discussions include an e-mail dated September 30, 2019 in which the Plaintiff's counsel specified certain documents which were previously delivered (or already in the Defendant's possession), and that she indicated comprised the treating physician's narrative. These documents were:

1. Only two of the four notes or forms discussed above that were signed by Dr. Nathan. There two documents may be described as:
   a. The Attending Physician's Report which refers to an examination of the Plaintiff by Dr. Nathan on July 16, 2012. This document was already in the Defendant's possession prior to litigation;

   b. A note dated September 13, 2012 that states "pt is having increase [sic] in anxiety and stress. The began [sic] May 28/12. Due to the poor prognosis of her condition pt is unable to return to work. See attached APR [referencing the attending physician's report described above]". This document was

delivered to the Defendant in November, 2014 as part of the disclosure process.

2. Internal Chart Notes: These are 4 pages of handwritten chart notes from Dr. Nathan's internal file records. They generally contained observations and notes made during a number of visits by the Plaintiff to the medical clinic between May 28, 2012 and December 12, 2012 ("Chart Notes").[1]

[13] By e-mail dated September 30, 2019, Kristina Reid Boudreau, replying for the Prothonotary Elizabeth MacLeod, responded to Mr. Mitchell's request for a date to argue an anticipated motion on whether certain medical records constituted a physician's narrative under Rule 55.14. A Special Chambers time on October 22, 2019, was held for the motions.

[14] By e-mail dated October 7, 2019, Court staff requested that the parties file their motion and supporting materials.

[15] By e-mail dated October 8, 2019, the Plaintiff's counsel expanded the content of the treating physician's narrative to include a third note signed by Dr. Nathan. This note was dated June 7, 2012 and was already in the Defendant's possession prior to litigation.

[16] There was an e-mail exchange over the next few days, that resulted in Court Administration removing the October 22, 2019, date. Each counsel took the position that the other party was responsible for making the preliminary motion and that neither counsel intended to make the motion on its own initiative. The Court did not direct any particular party to advance the motion. Either party was entitled to bring this motion under the Rules.

[17] In any event, the Court scheduled a further organizational conference call on November 5, 2019, eight days before trial was scheduled to begin on November 13, 2019 in Windsor, Nova Scotia. The purpose of the call was to discuss the Defendant's failure to file a pre-trial brief and to again raise the issue of the proposed physician's narrative.

[1] The chart notes also include the record of a visit on April 26, 2012. However, the Plaintiff confirmed that this entry does not form part of the physician's narrative for the purposes of this action as it pre-dates the termination without cause on May 24, 2012.

[18] At that time, the Defendant agreed to file this motion under Rule 55.15 for an advance ruling.

[19] Also, on November 5, 2019, the Plaintiff's counsel again expanded the content of the physician's narrative to include the fourth of the four notes signed by Dr. Nathan described above. It is apparently dated June 30, 2012. This note was also in the Defendant's possession prior to litigation.

THE LAW

[20] Witnesses typically testify as to facts and not opinion. As a general rule, opinion evidence is excluded because opinions are inferences based on the proven facts. The Court (not witnesses) determines what inferences may be properly drawn --or what opinions should be formed -- from the facts (see *R. v. D. (D.)*, [2000] 2 S.C.R. 27, at para. 49; and *R* v *K. (A.)*, 1999 CarswellOnt 2806, [1999] O.J. No. 3280 (C.A.)).

[21] Exceptions arise. A lay witness may offer opinions that are within the knowledge or experience of an ordinary person *(R. v. Graat*, [1982] 2 S.C.R. 819). Examples include opinion evidence as to whether a person seemed sick, or intoxicated or angry; or whether a car was moving quickly.

[22] Expert opinion is permitted where the Court needs assistance on matters that require special training or experience that is outside the knowledge of an ordinary person. The expert opinion provides the court with the "necessary technical or scientific basis upon which to properly assess the evidence presented": Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canad*a, 4th ed. (Markham: LexisNexis Canada, 2014) at 784.

[23] The law developed a number of statutory, common law and procedural safeguards to better ensure that expert opinion evidence enhances the litigation process and does not, for example, unintentionally contaminate the judicial decision-making function with opinions that may be unreliable or unnecessary.

[24] Thus, an expert witness must be properly qualified or have the necessary degree of specialization to offer the opinion. In addition, expert opinion will not be admitted unless it is:

1. Logically relevant to a material issue;

2. Necessary;

3. Not contrary to any other exclusionary rule of evidence;

(*R* v *Mohan*, [1994] 2 S.C.R. 9)

[25] There is also a further intermediary step where the reliability of the opinion evidence must be established if it is based on science that is novel or contested (*White Burgess Langille Inman* v *Abbot and Haliburton,* 2015 SCC 23, referred to as "*WBLI*").

[26] Finally, the court performs a further "gatekeeper" function in which the judge "balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks." (*WBLI,* at para 23)

[27] These principles governing the qualifications of the proposed expert and the admissibility of the opinion are within the purview of the presiding trial judge. That said, civil procedural rules provide further pre-trial protections against the potential prejudicial impact of expert opinion evidence.

[28] Pausing here, it is necessary to distinguish procedural protections from the more substantive, legal principles around admissibility. Rules of civil procedure provide direction on <u>how</u> expert evidence is presented to or brought before the court. They do not determine whether the expert is qualified, whether the opinion evidence is admissible, or how much weight is ultimately attached to the opinion evidence.

[29] Rules of civil procedure outline the steps that must be taken in advance of a trial or hearing before a party might offer expert opinion evidence in court. They engage issues of notice, including:

1. Timing – both the identity of the expert and the proposed opinion must be disclosed well in advance of the trial or hearing; and
2. Content – expert opinion must disclose the necessary information to properly understand how the opinions were formed and the party offering the opinion must disclose copies of anything considered by the expert, including documents, electronic information and real and demonstrative evidence.

[30] Some of the concerns that underpin the civil procedure rules on expert opinion overlap with those underpinning the law on admissibility of expert opinion. Both recognize and reflect the risks and unique qualities of opinion

evidence. However, the scope and purpose of Rule 55 is different. It is focussed primarily on notice and related matters like fairness, avoiding surprise and ensuring clarity. The dichotomy between procedure and the substantive law on admissibility is recognized in Rules 55.01(1), 55.01(2), 55.10(3) and 55.15(4). All of these rules clearly distinguish conformity with the procedural requirements under Rule 55, on the one hand, from the exclusive jurisdiction of the trial or hearing judge to determine issues of qualification, admissibility and weight, on the other.

[31] In addition, when considering Rule 55, the cautionary words in *Hryniak* v *Mauldin*, 2014 SCC 7 ("*Hryniak*") about a litigation "culture shift", and the need to apply rules of civil procedure in a proportionate manner, are applicable. So is the related promise of expeditious, inexpensive and just proceedings under Rule 1.01.

[32] Nova Scotia's current Civil Procedure Rules came into force on January 1, 2009. They instituted a number of significant reforms designed to enhance the process of civil litigation. The procedural innovations include an expanded application process (Rule 5), a process for securing earlier trial dates (Rule 4.16), and a new rule on expert opinion (Rule 55). This new expert opinion rule also created the exception called the "treating physician's narrative" (Rule 55.14).

[33] Focussing on Rule 55.14 (treating physician's narrative), the costs and administrative demands of preparing a formal expert report under Rule 55.04 were considered too onerous for cases where a party wished to rely on the opinion evidence of a treating physician. Unlike an expert retained for the purposes of litigation, the treating physician's observations and opinions in relation to the litigant arose in the ordinary course of practising medicine. Rule 55.14 implicitly recognized that treating physicians may be reluctant to engage in the litigation process if they are expected to comply with the stringent requirements of a Rule 55.04 report. This reluctance would threaten a party's access to justice.

[34] At the same time, Rule 55.14 recognized that relaxing the requirements for expert opinion evidence for treating physicians presented its own risks. The Rule mediates those risks by making treating physicians' evidence inadmissible where it would ambush or catch the opposing party unaware or deprive an opposing party a fair opportunity to respond to the opinion evidence.

[35] These competing risks might generally be described as the tension between concerns over access to justice and the need to ensure trial fairness. Neither

objective can be pursued to the exclusion of the other. Rule 55 seeks to strike a proper balance between the issues to facilitate the just resolution of legal disputes.

[36] A key, if not critical, procedural mechanism for striking this balance is notice - in terms of time and content. Rule 55 specifically addresses these issues as follows:

1. Time. Rule 55.14(2) states:

> In an action, a treating physician's narrative must be delivered:
>
> a. no more than 30 days after pleadings close, if the treatment occurred prior to the action being started; or
>
> b. within a reasonable time after treatment is provided during the course of an action and no later than the finish date.

2. Content: Rule 55.14(1) states that the treating physician's narrative must include the relevant facts observed, and the findings made, by the physician during treatment (Rule 55.14(1)). On this issue, Rule 55.14(6) further states that the information in a treating physician's narrative must be sufficient for the opposing party "to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician."

[37] Pausing here, there is a relevant connection between the wording of Rule 55.14(6) and that of Rule 55.15(1) enabling a party to seek an advance ruling on a physician's narrative. Both rules respond to the question: when does a treating physician's narrative contain "sufficient" information to permit that person to testify? How is the concept of "sufficiency" to be measured?

[38] Rule 55.14(6) states that the information is sufficient if it enables another party "to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician." Rule 55.15(1) returns to the same concept, stating that a Judge may determine whether a treating physician's narrative "contains sufficient information to permit a treating physician to testify".

[39] From that, one might conclude that a treating physician's narrative is sufficient if it simply contains enough information to allow another party to properly prepare for the trial or hearing (i.e., engage another expert or prepare for cross-examination). However, any assessment of sufficiency necessarily involves

whether the proposed narrative includes the relevant facts observed, and the findings made, by the physician during treatment, as required under Rule 55.14(1).

[40] There are other rules which influence the meaning and scope of a treating physician's narrative. They reinforce the related concerns about proportionality and efficiency. For instance:

1. A party may not discover an expert unless the party who delivered the expert report agrees (Rule 55.01(d) and 55.11(1)). By contrast, Rule 55.14(4) creates a blanket prohibition against the discovery of a treating physician. So, the parties themselves may not agree to discover a treating physician or obtain an order for the discovery of a treating physician;
2. Unlike an expert who files a report under Rule 55.04, Rule 55.14 does not entitle a party to demand that a treating physician answer written questions (compare Rule 55.11 and Rule 55.14); and
3. The content of an expert's report under Rule 55.04 is that expert's evidence in chief. No further direct examination is permitted unless the presiding judge permits (Rule 55.13(3) and (4)). However, the rule is more relaxed for a treating physician. There is no default prohibition against direct evidence, but the party presenting a treating physician's narrative "may not advance evidence from the physician about a fact, finding or treatment not summarized in a narrative or covered in an expert's report." (Rule 55.14(5))

[41] As to the relevant jurisprudence, I considered several cases.

[42] In *Shaw v. J.D. Irving Limited*, 2011 NSSC 487 ("*Shaw*"), the plaintiff delivered a treating physician's narrative in March 2008. The narrative took the form of notes made during treatment. Subsequently, on November 14, 2011, the plaintiff delivered another narrative in the form of a letter dated June 2, 2010. The finish date was November 3, 2011 with the trial scheduled to begin on January 30, 2012. On December 29, 2011, Scaravelli J. heard a motion to redact the notes delivered in March 2008 and to exclude the letter delivered on November 14, 2011.

[43] Scaravelli J. focussed on concerns about trial fairness and the related issue of notice to the opposing party. He wrote that, "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" (para 11).

Scaravelli J. also addressed the importance of assessing, and being live to, the difference between opinions developed for therapeutic purposes (i.e. treating physician's narratives) and those developed for the purposes of litigation (i.e. requiring a more formal report under Rule 55.04). Thus, and notably for present purposes, Scaravelli J. concluded that the chart notes were produced well before trial during the disclosure process and "contain sufficient information to support her opinion that carpal tunnel could have been initiated or worsened by the accident" (para 12). By contrast, a report made in the context of a pending trial and not delivered prior to the finish date would "circumvent the rule relating to opinion evidence" (para 13).

[44] In *Russell* v *Goswell*, 2013 NSSC 383 ("*Russell*"), the plaintiff sought damages for personal injuries allegedly suffered during a motor vehicle accident. The plaintiff sought to introduce the treating physician's chart notes. The defendant did not object and acknowledged that the chart notes could be introduced under Rule 55.14. However, the defendant did object when the plaintiff also sought to introduce five letters under Rule 55.14. These letters were authored by the same treating physician and were addressed either to the Section B insurer or plaintiff's counsel.

[45] Justice Duncan concluded that the letters did not qualify as a treating physician's narratives. In reaching that conclusion, he noted that the following three questions must be asked to help identify whether a document complies with Rule 51.14:

1. Does the document set out the relevant facts observed?
2. Does the document set out the findings made?
3. Were the facts observed, and findings arrived at, made during treatment?

[46] Justice Duncan further concluded that the differences between a Rule 55.04 expert report and a treating physician's narrative "are so striking as to make it apparent that what constitutes a treating physician's narrative must be strictly construed to avoid, as Scaravelli J. expressed [in *Shaw*], any circumvention of Rule 55.04" (para 24).

[47] This was the first decision to require that Rule 55.14 be strictly construed. While this conclusion has been subsequently followed, in fairness, it should be noted that Justice Duncan's conclusions were made before the release of the

seminal decision of *Hryniak*, discussed above. As a result, the court's analysis of Rule 55.14 in *Russell* did not (and could not) consider the Supreme Court of Canada's clarion call for a "culture shift" and an approach to civil procedure rules that better ensures proportionality.

[48] Regardless, Duncan J. focussed on two main concerns:

1. Certain opinions were not made for therapeutic purposes but, instead, were predominantly designed for litigation. These opinions included commentary on potential future treatment and prognosis, along with causation. Notably, for present purposes, certain statement of facts drawn directly out of clinical notes were not controversial because "the chart notes are already agreed upon as being physician narratives"; and
2. The fact that certain opinions were not based on the treating physician's own observations but were derivative and represented an attempt to interpret and extrapolate from the observations of other physicians.

[49] While Duncan J. clearly confirmed that Rule 55.14 must be strictly construed, his reasons reflect concerns about notice, ensuring that the opinions or findings can be fairly understood, and distinguishing between opinions made for therapeutic purposes and those made predominantly for litigation.

[50] I turn now to Boudreau J.'s decision in *Bezanson* v *Sun Life Assurance Co of Canada*, 2015 NSSC 1 ("*Bezanson*"). Interestingly, *Bezanson* does not consider Rule 55 because none of the parties in that case invoked this Rule. Instead, Boudreau J. was considering the evidence in the context of a debate over the admissibility of medical records under the business records hearsay exception. As indicated, the issue of admissibility of the evidence was within her exclusive purview as trial Judge. Although the context is distinguishable, this decision is relevant because it influenced subsequent decisions of this Court on Rules 55.14 and 55.15, including *Bruce* v *Munro*, 2016 NSSC 341 ("*Bruce*"), discussed below.

[51] In *Bezanson*, the Plaintiff sought a declaration that she was totally disabled from her employment. She called her family doctor as a witness and the family doctor's entire file was marked as Exhibit 1. The following additional facts help provide context for the Court's decision:

1. The file in question was thick and contained a variety of documents (mainly medical and insurance related) authored by many different people, including the family doctor;
2. The family doctor was offering an opinion that went to the heart of the matter (i.e. that the plaintiff was unable to work full-time); and
3. The family doctor's opinion was derivative in the sense that it was based on opinions from other medical specialists. It was also based on a certain amount of subjective self-reporting from the Plaintiff herself. That said, the file also contained information that was directly connected to the family doctor, including his own personal observations and medical responses to what he observed (e.g. prescribing pain medication).

[52] In considering the admissibility of the family doctor's entire file, Boudreau J. completed a thorough review of *Ares* v *Venner*, [1970] S.C.R. 608 ("*Ares*") and focussed on the "business records" exception to hearsay evidence by statute and at common law. She concluded:

> Where a person with specialized knowledge in an area, having reviewed and analysed information, has arrived at his/her own subjective conclusion, and gives an opinion, such opinion is subject to special rules of evidence. It cannot be introduced to a court for its truth, without respect for those rules.
>
> *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. (paras. 30 – 31)

[53] Again, however, it must be emphasized that Boudreau J. did not reach these conclusions in the context of a motion under either Rule 55.14 or Rule 55.15.

Rather, as presiding judge, she was confronted with (and required to determine) the admissibility of medical records.[2]

[54] In *Bruce*, the plaintiff was involved in a motor vehicle accident on December 29, 2011. Her trial was scheduled to begin on January 9, 2017. A motion was heard on December 9, 2016, about one month before the trial was scheduled to begin. The plaintiff had given notice that she intended to rely on several treating physicians' narratives of various medical doctors pursuant to Rule 55.14, and a purported rebuttal expert report filed pursuant to Rule 55.04. The treating physician's narratives in this case consisted of four letters of referrals from the treating physician to other medical specialists.

[55] Rosinski J. introduced the motion by noting that the defendant "disputed the admissibility of these documents" (para 1). That word "admissibility" is important because it framed the discussion and explains why significant portions of Rosinski J.'s decision consider *Bezanson* where Boudreau J., as presiding Judge, was also required to consider the admissibility of certain medical records.

[56] Rosinski J. excluded much of the proposed treating physician's evidence because, in his view, it offended the rules regarding hearsay and was therefore inadmissible (see paras. 34, 36, 37, 38 and 40). Rosinski J. referred to *Bezanson* and confirmed that "generally speaking, the hearsay restrictions identified by Justice Boudreau in *Bezanson* at para. 29 apply equally to treating physicians' narratives" (para 20).

[57] Rosinski J. appears to have been the Judge who was presiding over the trial one month later. As such, he would have been both authorized to, and required to, make determinations concerning admissibility.

[58] That said, Rosinski J. incorporated a number of comments regarding Rules 55.14 and 55.15 into his analysis. Immediately after invoking the hearsay restrictions identified by Boudreau J. in *Bezanson*, he stated that: "Consequently,

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[2] *Banfield* v *RKO Steel Ltd.*, 2017 NSSC 315, is another example of *Bezanson* properly being applied by a presiding Judge required to consider the issue of admissibility. In that decision, Chipman, J. heard several motions on December 1, 2017. He was to preside over a seven day Jury trial scheduled to begin the next Monday. One of the motions related to the admissibility of a proposed treating physician's narrative. He determined that a proposed treating physician's narrative was inadmissible. In doing so, he relied upon the decision of Boudreau J. in *Bezanson* and also referred to the purpose of Rule 55 when considering the issue of prejudice as part of his "gatekeeper" function. However, to be clear, this decision is distinguishable in that it was not a decision for an advance ruling under Rule 55.15.

the expert opinion evidence suggested to be contained in a treating physician narrative must not be ambiguous, and must be based on the treating physician being a properly qualified expert, having made his/her own factual observations and findings regarding the patient during treatment" (para 21). He went on to write that, in his opinion, "it will likely be uncommon that these requirements for expert opinion evidence contained within a treating physician narrative will be met in many cases" (para 22).

[59] Rosinski J. ultimately concluded that much of the proposed treating physician's narrative was "not admissible" and, in doing so, indicated that the narrative was either based on material facts that were not directly and personally observed by the physician and/or not a "finding" in the nature of "expert opinion".

[60] To the extent the decision in *Bruce* was a determination of admissibility by the presiding judge, the comments regarding Rule 55.14 and 55.15 would be *obiter* and would not be binding on a judge hearing, for example, a motion for an advance ruling under Rule 55.15. As indicated, questions concerning admissibility are the domain of the judge presiding over the trial or hearing (see, for example, Rule 55.01(2) and 15.15(4)). Those issues are separate and distinct from the interpretation and application of the rules regarding a treating physician's narrative.

[61] In *Halliday* v *Cape Breton District Health Authority*, 2017 NSSC 201 (*"Halliday*"), the plaintiff sought to introduce the entire file of a person acknowledged to be a treating physician. It was also agreed that the physician was the author of the notes contained in the file. The difficulty was that the plaintiff failed to identify the specific opinions being relied upon. Gogan J. again was especially live to concerns around proportionality (see paras. 14 to 15 and 38) which were to be balanced against:

> 1. Concerns about notice and trial fairness. In this case, the plaintiff failed to identify the specific opinions relied upon. As Gogan J. noted, this failure was particularly problematic in view of the nature of the court's assessment on a motion of this nature, and the fact that the onus was on the Plaintiff as the party seeking to rely on the opinions contained in the documents. Moreover, Justice Gogan confirmed that the information contained in the chart notes did not represent a sufficient evidentiary basis to support the observations, conclusions or findings being expressed. Related to this issue was

Justice Gogan's concern that there be enough information provided to assess whether the opinion was based on self-reporting by the patient as opposed to actual observation and treatment (para 32); and

2. Distinguishing actions taken for "therapeutic purposes" and "research and development of opinions beyond treatment". Recognizing this distinction helps separate the opinion of a treating physician from other forms of expert opinion under Rule 55. It will also ensure that the opinion, inter alia, comes from someone who is (1) qualified to provide it, (2) understands the obligation to be independent and objective, and (3) fully explains the basis for the opinion (para 39).

[62] I would summarize and synthesize the Rules and related jurisprudence regarding a treating physician's narrative as follows:

1. Rule 55.14 (physician's narrative) and 55.15 (advance ruling on a physician's narrative) should be strictly construed to prevent the use of Rule 55.14 as a means of contravening Rule 55.04. In particular, courts should be vigilant to prevent the introduction of expert opinion evidence under the guise of a treating physician's narrative. For example, a party receiving the physician's narrative may reasonably expect clarity in terms of notice – both in terms of time (when the treating physician's narrative is delivered) and content (ensuring that the treating physician's observations and the actual opinions being relied upon are properly identified). These concerns reflect the requirement that a party receiving the treating physician's narrative be afforded a reasonable opportunity to prepare for trial.
2. At the same time, the treating physician's narrative is an effort to balance concerns about notice and trial fairness with equally important concerns about access to justice and proportionality. If the requirements under Rule 51.14 are applied too rigidly, treating physicians may become reluctant to assist patients in advancing meritorious claims because the administrative burden and the costs associated with litigation are unduly onerous. In the end, the Rule should be applied with a view to balancing the underlying demands of proportionality, access to justice, trial fairness and notice in terms of time and the clarity with which the treating physician's observations and opinions are expressed. On this point, I reiterate that the decision in *Russell* directing that Rule 55.14 be strictly construed pre-dates

(and therefore did not consider) the Supreme Court of Canada's clarion call in *Hryniak*.

3. The requirement for proper notice and trial fairness engages considerations of time and content. As to timing, the treating physician's narrative (initial and supplementary) must be delivered at a reasonably early stage following receipt of the medical treatments. However, where treatment is ongoing, opinions must be delivered with reasonable despatch.

4. As to content:

    a. Unlike an expert report under Rule 55.04 a treating physician's narrative does not need to conform with any particular format or comply with pre-determined standards in terms of content;

    b. The treating physician's narrative must obviously be relevant to a material fact;

    c. The treating physician's narrative must enable the opposing party to understand the relevant facts observed by the treating physician and to identify the findings or opinions flowing from those observations;

5. In terms of complying with Rule 55.14's underlying purpose, Rule 55.15 confirms that the treating physician narrative must enable the opposing party to fairly prepare for cross-examination and, if necessary, engage an expert.

6. Whether the information contained in a proposed treating physician's narrative is sufficient to permit the treating physician to testify is contextual and case-specific. A number of factors bear upon the analysis, including, without limitation:

    a. Whether the party presenting the treating physician's narrative has identified the opinions being relied upon or simply delivered the treating physician's file without reasonably clarifying the findings or opinions being relied and the basis for that opinion (i.e. the observations which underpin those opinions);

    b. The volume of the information delivered. Is the opposing party simply given a mass of chart notes and left to

identify the relevant opinions? By contrast, is the information delivered manageable in terms of volume and easily understood when analysed against the allegations in dispute?

c. The quality of the information delivered and, for example, whether it is sufficiently legible;

d. The observations made during treatment and the extent to which they are:

i. Made by the treating physician directly;

ii. Based on objective data or testing received by the physician;

iii. Based on information received from the patient (self-reporting);

iv. Based on information received from other professionals;

e. The findings or opinions expressed by the treating physician and the extent to which they are:

i. Directly attributable to the treating physician;

ii. Derivative and mainly attributed to another person or medical professional;

iii. Provided for therapeutic purposes or, alternatively, predominantly for litigation (e.g. responding to questions posed by legal counsel or transparently focussed on a key legal issue such as causation);

In the process of weighing any of these factors under a Rule 55.15 advance ruling, it should be borne in mind that the focus is on notice and trial fairness which, in turn, incorporates questions around time of delivery and content.

7. The onus falls upon the person seeking to introduce the evidence in question to satisfy the Court that that the exception granted for physician narratives under Rule 55.14 applies (Rule 55.14(6)). There are three related risks that are borne by the party seeking to introduce a treating physician's narrative:

a. If there is an advance ruling under Rule 55.15, the evidence may be excluded although the Judge may provide directions that address any problems (Rule 55.15(2);

b. If there is no advance ruling and a party does not otherwise comply with the procedural requirements of Rule 55.15, the evidence will be excluded by the presiding Judge at trial - not because the evidence is necessarily inadmissible but because the procedural pre-requisites to present the evidence have not been met;

c. In all cases and regardless of whether there has been an advance ruling, any challenges regarding admissibility will be determined by the presiding Judge at trial or hearing. Similarly, the weight given to an opinion will be determined by the presiding Judge or Jury. A party may present opinion evidence that complies with the procedural requirements of either Rule 55.04 or Rule 55.14 that is ultimately deemed either inadmissible or given little weight.

APPLICATION OF THE LAW

[63] I am prepared to allow the physician's narrative subject to certain conditions described below. I do so for the following reasons:

1. The documents in question have been in the Defendant's possession for almost five years. To that extent, they were delivered to the Defendant prior to the Finish Date in accordance with Rule 55.14;
2. The documents in question are manageable in terms of volume. The handwritten Chart Notes are less than four pages in length and relate to a discrete period of time (May – July, 2012). There are only four other notes or forms which were signed by the Plaintiff and they are reasonably legible;
3. The handwritten internal chart notes were delivered in November, 2014, about five years before the trial began. They are reasonably legible subject to my further directions on this issue below;
4. Three of the four forms or notes signed by Dr. Nathan were in the Defendant's possession prior to litigation being commenced. The fourth was delivered in November, 2014, about five years before the trial began. That said, I do have concerns regarding the way in which these notes were included as part of the treating physician's narrative in the months leading up to trial. I re-visit this issue below;

5. The relevance of these documents and the identity of the treating physician was made clear in the Statement of Claim filed in September, 2012 – more than seven years ago. On this, I note the specific reference in the pleadings to Dr. Nathan, as well as the specific allegations of a stress-related illness during the times in question;
6. As a result of the pleadings and the relevant disclosure, all of which was completed many years before trial, I find that the Defendant would have had sufficient notice (in terms of time and content) to prepare for trial and consider retaining its own expert;
7. Almost all of the information in question predates litigation and are limited to the time frame when the material facts giving rise to the cause of action were unfolding. The purpose of this information was not predominantly focussed on litigation but, rather, was primarily related to the treating physician's ongoing care of the plaintiff; and
8. The opinions contained in the notes were based on observations made or formulated during treatment.

[64] Having said that, I do have concerns regarding certain information and the Plaintiff's evolving position in the months leading up to trial. As such, I make the following additional determinations and directions under Rule 55.15(2):

1. The relevant information in the internal chart notes of Dr. Nathan shall be limited to that which is specifically connected to the stress-related illness described in the pleadings. Expanding on the relevant medical issues at this date would work an unfairness to the Defendant. Any extraneous information is not properly part of the treating physician's narrative under Rule 55.14. I direct the Plaintiff to exclude such information from the internal chart notes; and
2. I am not prepared to allow the two additional documents identified by the Plaintiff on October 8, 2019, and November 5, 2019 to form part of the treating physician's narrative to be used at trial.
3. While they were delivered well in advance of trial, the Plaintiff responded to a request by the Defendant by narrowing the relevant documents which comprise the treating physician's narrative. Having done so, the Plaintiff may not subsequently and continually expand the relevant documents in the month leading up to trial - certainly not

absent an exceptional reason for doing so. I do not find that those exceptional reasons exist here.

4. Again, one key purpose of Rule 55.14 is to provide the opposing party with fair notice in terms of time (i.e. delivering the physician's narrative) and content. Allowing a party to expand upon the content of the treating physician's narrative in the month preceding trial would, in the circumstances of this case, work an unfairness which is inconsistent with Rules 55.14 and 55.15.

[65] Again, and for final clarity, this is a decision for an advance ruling under Rule 55.15. Nothing in this decision should be deemed to be a conclusion on admissibility.

[66] The motion is dismissed subject to the directions provided above.

Keith J.