SUPREME COURT OF NOVA SCOTIA
Citation: *Phillips v. Timmons*, 2025 NSSC 269

Date: 20250814
Docket: *Syd*, No. 519941
Registry: Sydney

Between:

Shelley Phillips

Plaintiff

v.

Robert Timmons and Maritect Investigations and Security Limited

Defendants

Judge: The Honourable Justice D. Shane Russell

Heard: July 16, 2025, in Sydney, Nova Scotia

Counsel: Matthew Hack, for the Plaintiff
Jane Soucy, for the Defendants

By the Court:

Overview

[1] The Defendant has filed a Motion for Production. The Defendant moves for an order requiring the Plaintiff to disclose historical medical records relating to a left knee injury from 2007/2008.

[2] The narrow issue on this motion is whether these records are "relevant disclosure" as that term is defined under the *Civil Procedure Rules*.

Facts

[3] On April 5, 2022, the Plaintiff was a passenger in a vehicle that was struck from behind ("the accident"). The Plaintiff pleads that, because of the Defendant's negligence, she suffered personal injuries including straining, tearing and trauma to the muscles, tendons and ligaments in her neck, shoulders, back and left knee. Liability is not in dispute, however, there is a dispute about several issues relating to damages, including causation, quantum, and mitigation.

[4] The Plaintiff started her Action on December 21, 2022. Documents were disclosed on May 28, 2024. The Plaintiff's disclosure included her medical records dating back to five years prior to the accident.

[5] Discovery of the Plaintiff took place on October 24, 2024. During her examination, the Plaintiff stated that in or around 2007/2008 she was hit by a vehicle while in a crosswalk (the "historical crosswalk accident"). As a result of this historical accident, she suffered knee pain requiring treatment.

[6] During discovery, counsel for the Defendant requested that the Plaintiff provide:

1. A copy of the Plaintiff's physiotherapy records from Cabot Physiotherapy related to the 2007/2008 left knee injury;

2. A copy of any medical reports for treatment provided to the Plaintiff in relation to her 2007/2008 knee injury; and

3. Diagnostic imaging records relating to the Plaintiff's 2007/2008 left knee injury.

[7] At discovery, counsel for the Plaintiff took these requests under advisement. The requests were later denied.

The Plaintiff's Motion Affidavit and Discovery Evidence

[8] In her motion affidavit, the Plaintiff agrees that she sustained soft tissue injuries to her left knee in 2008. However, she adds that she "made a complete recovery with no limitations". Further, she states that she has "not received any physical therapy or medical treatment" for her knees "for over a decade prior to the

accident". The Plaintiff adds that "I became a nurse in 2014 and worked in that capacity for eight years without experiencing any physical limitations or issues related to my knees".

[9] A review of the discovery transcript reveals several important facts:

1. The Plaintiff testified that following the historical crosswalk accident, she suffered an injury to her left knee. As a result, she had a knee scope. This 2007/2008 procedure included diagnostic imaging completed by Ms. Shelly O'Neil.

   The Plaintiff testified that the results showed that because of the historical crosswalk accident she "probably had a little tiny bit" of degenerative change and arthritis in her left knee. However, at that time, she "wasn't aware" and the arthritis was "non-debilitating". The Plaintiff further added that she was told that the left knee injury "exacerbated, and that's- with the impact, that's what contributed to the way you are today". Finally, the Plaintiff gave evidence that the diagnostic imaging following the historical crosswalk accident showed the presence of osteoarthritis in her knees.

   (Discovery Transcript pages 23, 29, 105-106)

2. The Plaintiff testified that following the historical crosswalk accident she underwent physiotherapy for a "couple of years" at Cabot Physiotherapy. She recalls receiving treatment from Ms. Joan Chiasson. She was prescribed special shoes with insoles and underwent treatment from a TENS. She testified that after completing physiotherapy, the knee "never gave me any issues again. I didn't have any more problems with that knee", "I healed, I was okay".

   (Discovery Transcript pages 23-24)

3. A medical record from February 26, 2024, contains correspondence from Dr. Reem Shishko to Orthopedic surgeon Dr. Johnny Rayes. Both doctors have treated the Plaintiff for her current injuries relating to the April 5, 2022, accident. The doctor writes, "MVC that she was involved in a couple of years ago worsened her already bothersome

knees". During discovery, the Plaintiff was questioned about these comments. She testified that the doctor would have known about the historical diagnostic imaging taken in 2007/2008. She stated:

> I know that sometimes doctors will go back to get a patient history, and she had probably seen about the scope on my knee and knew that I must have had issues in the past. But as I said, they were cleared up with treatment.

(Discovery Transcript pages 28-29)

4. The Plaintiff disclosed that her doctor at the time of the historical crosswalk accident was Dr. Peter Littlejohn.

(Discovery Transcript page 29)

Position of the Parties

Defendant

[10] The Defendant submits that the information sought is relevant disclosure. It is better to take a more liberal approach to disclosure at the discovery stage. All *Laushway* factors weigh in favor of production. The purpose of the records is to understand the Plaintiff's whole pre-accident health. This is necessary for a just and fair assessment of any damages arising from the Plaintiff's injuries as alleged.

Plaintiff

[11] The Plaintiff opposes production of the documents on the basis that they are not relevant, and that five years of pre-accident disclosure provides the Defendant with more than sufficient access to the Plaintiff's baseline health. There are serious

privacy and proximity concerns. These records date back 14 years, and the Plaintiff states she fully recovered. The Defendant's application is grounded in speculation.

Law

What is Relevance?

[12] Relevance has been defined as follows:

> Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence. To identify logically irrelevant evidence, ask, 'Does the evidence assist in proving the fact that the party calling that evidence is trying to prove?' (D.M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p.35).

[13] In *R. v. Schneider*, 2022 SCC 34, the Supreme of Court of Canada provided guidance on how to determine relevance. I will summarize the Supreme Court's words with citations omitted:

1. To determine relevance, a judge must ask whether the evidence tends to increase or decrease the probability of a fact at issue. Beyond this, there is no "legal test" for relevance.
2. Judges, acting in their gatekeeping role, are to evaluate relevance "as a matter of logic and human experience". When doing so, they should take care not to usurp the role of the finder of fact, although this evaluation will necessitate some weighing of the evidence, which is typically reserved for the jury.
3. The evidence does not need to "firmly establish ... the truth or falsity of a fact in issue", although the evidence may be too speculative or equivocal to be relevant. The threshold for relevance is low and judges can admit evidence that has modest probative value.
4. A judge's consideration of relevance "does not involve considerations of sufficiency of probative value" and "admissibility ... must not be confused with

> weight". Concepts like ultimate reliability, believability, and probative weight have no place when deciding relevance. Whether evidence is relevant is a question of law, reviewable on the standard of correctness.

[14] The Supreme Court of Canada provided further guidance in *R. v. Blackman*, 2008 SCC 37:

> 30 Relevance can only be fully assessed in the context of the other evidence at trial. However, as a threshold for admissibility, the assessment of relevance is an ongoing and dynamic process that cannot wait for the conclusion of the trial for resolution. Depending on the stage of the trial, the "context" within which an item of evidence is assessed for relevance may well be embryonic. Often, for pragmatic reasons, relevance must be determined on the basis of the submissions of counsel. The reality that establishing threshold relevance cannot be an exacting standard is explained by Professors D. M. Paciocco and L. Stuesser in *The Law of Evidence* (4th ed. 2005), at p. 29, and, as the authors point out, is well captured in the following statement of Cory J. in *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38:
>
> > To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue".

Guiding Principles Motion for Production

[15] Justice Hoskins in *Teimouri v. Lake Loon Developments Limited,* 2024 NSSC 404 summarized the guiding principles underpinning a Motion for Production. They are as follows:

1. Rule 14.12 gives this Court authority to order a party to produce relevant documents.
2. The moving party has the onus to establish that the sought-after disclosure is relevant as defined by Rule 14.01 of the *Nova Scotia Civil Procedure Rules* and the jurisprudence.
3. Once relevance has been established, Rule 14.08 of the *Nova Scotia Civil Procedure Rules*, dictates that full disclosure of relevant documents is presumed and the party

> seeking not to disclose relevant information or documents has the burden of rebutting the presumption for disclosure.

[16] Very recently Justice Norton in *Baker v. Borovsky et al.*, 2024 NSSC 328 completed a comprehensive review of the law relating to relevant disclosure in civil cases. I adopt his summary between paragraphs 13 to 15:

> 13 Disclosure obligations are dealt with by *Rules* 14 and 15. Parties are required to disclose documents in their control that are "relevant" as that term is defined by *Rule* 14.01 and interpreted by the courts. The meaning of relevancy as defined in *Rule* 14.01 has been considered by the Nova Scotia Court of Appeal in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, and *Laushway v. Messervey*, 2014 NSCA 7. In Brown, Justice Bryson expressed the Court of Appeal's endorsement of Justice Moir's comments in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4. Justice Bryson wrote, at para. 12:
>
> > [12] In any event, I agree with Justice Moir's comments at para. 46 of *Saturley* that:
> >
> > [46] This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
> >
> > *The semblance of relevancy test for disclosure and discovery has been abolished.
> >
> > *The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.
> >
> > *The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The Rule does not permit a watered-down version.
> >
> > *Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.
> >
> > In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.

> [13] I also agree with Justice Moir that this does not mean a retreat from liberal disclosure of relevant information.

14 In *Laushway*, Justice Saunders, writing for the Court of Appeal, adopted this approach and then stated, at para. 49:

> [49] The observations of Wood, J. in a subsequent decision in **Saturley v. CIBC World Markets Inc.**, 2012 NSSC 57[,] are also instructive. In particular, I agree with Justice Wood's comments at para9-10 where he said::[sic]
>
> [9] In my view, the Court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.
>
> [10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter situation, there is a risk that the fairness of the trial could be adversely affected.

15 At para. 86 of *Laushway*, Justice Saunders provided a helpful outline of factors that a judge hearing a production motion may consider:

> [86] If it would assist trial judges in the exercise of their discretion when considering whether or not to grant production orders in cases like this one, let me suggest that their inquiry might focus on the following questions. They would supplement the guidance already contained in the **Rules**. The list I have prepared is by no means static and is not intended to be exhaustive. No doubt the points I have included will be refined and improved over time, and adjusted to suit the circumstances of any given case:
>
> 1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
>
> 2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production;
>
> 3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.

4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?
5. Proportionality: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?
6. Alternative Measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?
7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?
8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?
9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?
10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the Rules which is to ensure the just, speedy and inexpensive determination of every proceeding?

Analysis

[17] Relevant disclosure and trial admissibility coexist but are very different concepts. Relevant disclosure protects the integrity of the litigation process. It serves to inform the parties and put them on equal footing in advance of trial. Admissibility protects the integrity of the trial. It serves to properly inform the trier of fact. Evidence that is relevant for the purposes of disclosure may later be ruled inadmissible at trial.

[18] Conservative approaches to disclosure have historically been detrimental to the proper administration of justice. Assessing pre-trial disclosure through a restrictive opaque lens results in adjournments and mistrials. In a criminal law context, it results in wrongful convictions.

[19] Lawyers who zealously litigate on behalf of their clients sometimes inadvertently blind themselves to the subtleties of their disclosure obligations. Relevant information must not be held back for strategic purposes. Disclosure that is in the best interest of justice is relevant disclosure.

[20] I am mindful that my task is to access relevant disclosure in a civil context, however, I remain convinced that being too restrictive in civil matters can be just as insidious as it is in the criminal law realm. The words of Justice Wood (as he then was) in *Saturley* are worth repeating, "the Court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial".

[21] All of that said, a "liberal view of the scope of relevance" should not be misconstrued as an open invitation for fishing expeditions. Applications without substance are prejudicial, costly, time consuming, and a waste of judicial resources. Lawyers are obligated to avoid meritless applications in hopes that something may shake loose.

[22] Right now, the parties are at the pre-trial stage. Discoveries have just been completed and undertakings remain outstanding. Should there be a relevant logical nexus between the Plaintiff's historical medical records and these proceedings, it is better to lean on the side of disclosure. The parties can always argue admissibility at trial. I will now consider the factors outlined in *Laushway* as they apply to this case.

[23] Before I begin, it should be noted that many of the cases submitted by the Plaintiff in support of their argument were interpreted under the former standard of relevance which is no longer sound law (the semblance of relevance). As a result, despite containing some helpful commentary, these cases are of limited precedential value.

Connection

[24] The Plaintiff's claim is clear. This accident caused her injury. More specifically, in the context of this motion, the accident caused injury to her left knee. The extent to which this accident may have caused those injuries is a central issue.

[25] While the Plaintiff has given evidence that the historical left knee injury resolved, this claim appears to be at odds with other evidence. Most notably, the Plaintiff's discovery evidence was that the historical medical records revealed the presence of osteoarthritis. Despite claiming that she made a complete recovery and

that the arthritis was “not-debilitating” it is unclear if the arthritis is still present. There is also some suggestion that there may have been a degenerative change. This evidence should be considered in conjunction with the recent correspondence from Dr. Shishko. Dr. Shishko, when writing about the Plaintiff’s current injury and treatment, found it notable enough to make specific reference her “already bothersome knees”.

[26] In assessing relevance, counsel for the Plaintiff has essentially asked this court to take the client’s word for it. These old injures have long resolved and there is no connection between the old and the new. With all due respect, the Plaintiff is not a medical professional. The Plaintiff, in her own words, has stated that she was told that her left knee injury may have been “exacerbated” and this “contributed to the way you are today”. While the full context of these comments could have been clearer, they are nevertheless notable.

[27] The evidence on this motion supports that there may be some relevant nexus between the old knee injury and the new injury. The historical medical information may assist in providing objective evidence on the Plaintiff’s pre-accident physical condition and the extent to which the recent accident accounts for the current symptomology. Afterall, causation and damages remain central issues in this Action.

[28] Simply put, there is some evidence before this court to suggest that the historical medical records contain relevant information on a material issue before this Court. Connection weighs in favour of disclosure.

Proximity

[29] The Plaintiff argues that the records are not proximate. The records relate to an injury sustained 14 years ago that has fully resolved. Furthermore, it is argued, that five years of pre-accident disclosure is in keeping with the current "practice directive". I note that while there is no official "practice directive", both counsel agree that it has become standard practice to disclose up to five years of pre-accident medicals for similar cases. The Plaintiff states "five years of pre-accident disclosure already provided is more than sufficient to assess the Plaintiff's baseline health".

[30] Finally, the Plaintiff states, "the 2008 injury is temporally and factually remote. There is no continuity of care, no residual symptoms, and no alleged link between the 2008 injury and the 2022 injuries. The proximity is therefore distant and speculative which weighs strongly against compelled production".

[31] I do not accept the Plaintiff's argument. First, temporal proximity, while important, is not dispositive. Temporal proximity is not to be treated as the controlling factor in determining the scope of relevance. It is but one consideration.

As well, while the records and historical crosswalk injury may not be proximate in time, they remain integrally connected to the central issue of causation and damages. The integral connection lies in the ambiguity around the Plaintiff's "already bothersome knees" and whether her current symptomology may be linked to pre-existing injury.

[32] There is evidence before this court which moves the Defendant's request beyond the speculative. The Defendant has been able to point to "case specific" evidence supportive of a nexus between the historical injury and the current injury. Again, despite declaring that in her mind she made a full physical recovery, medical records did reveal arthritis and she "probably had a tiny bit" of degenerative change. The extent to which this arthritis has fully dissipated remains unclear. Even if I accept that the Plaintiff returned to work as a nurse for years afterword and that the historical injury was "non-debilitating", I am still satisfied that the relevance nexus has been established.

[33] The full extent to which these records may be determinative of causation and damages is unknown. As well, it is impossible for the Defendant to fully formulate an argument on this point given that they have never seen the records. However, at this stage, the Defendant does not have to firmly establish the "truth or falsity of a fact in issue". The threshold for relevance remains low. I find that despite the

limitations of temporal proximity, the integral connection weighs in favor of production.

Discoverability

[34] The pre-accident diagnostic records exists, so do the physiotherapy and follow-up treatment records. Furthermore, each record holder has been identified. There is nothing to suggest that this information has been lost or destroyed.

[35] These records appear to be the only independent objective non-party evidence which can speak to the condition of the Plaintiff's left knee prior to the accident. Without these, the Defendant is simply left with the Plaintiff's word. This is problematic considering the case specific evidence identified by the Defendant challenges the veracity of her self-reporting.

[36] There is no suggestion that the Plaintiff has intentionally mislead or been strategically selective in her reporting of the historic left knee injury. However, the reality remains that she is neither an independent party to this litigation nor is she a trained medical professional. Discoverability weighs in favor of production.

Reliability

[37] All three categories of records sought by the Defendant were medical records created during assessment, diagnosis, and treatment. Presumably all records were generated by healthcare professionals while acting in the course of their professional responsibilities. There is nothing to suggest that the content of these records would be inherently unreliable.

[38] Under this consideration, the Plaintiff makes a singular argument, "the reliability of any conclusions drawn from such stale records is questionable. Degenerative changes, if present, may have progressed independently over the intervening 14 years". With respect to Plaintiff counsel, it sounds like they are offering up a medical opinion for which they are not qualified to give. Meanwhile, the Defendant has stated that it is their intention to put this information in the hands of a properly qualified medical expert. Such an expert would have the skill set to objectively evaluate this historical medical evidence in the context of the current medical evidence. Reliability weighs in favor of production.

Proportionality

[39] The record holders have already been identified. The records are healthcare records. As well, the Defendant has identified the specific injury and time from where the diagnosis and treatment would have taken place. There is nothing to

suggest that locating these records would be overly complex, time consuming, or expensive. What has been requested is specific and narrow.

[40] The information sought is not peripheral. It relates to material issues at the center of this Action. The information sought is not only relatively inexpensive to obtain but also materially important. Proportionally weighs in favor of production.

Alternative Measures

[41] It is argued that the Defendant already has access to five years of the Plaintiff's medical records. The Plaintiff states the Defendant is "free to ask their expert to assess causation using those records". Further, it is suggested that the Defendant "has not demonstrated that expert opinion based on the existing, more recent records would be insufficient". For reasons I will explain, this argument is fundamentally flawed, and I reject it.

[42] The medical records related to the historical left knee injury originated outside the five-year window of documents disclosed by the Plaintiff. The diagnostic imaging and foundational records of this historical injury are presumably contained in records outside this 5-year window. As it currently stands this information is off limits to any Defence expert. It would put a Defence expert in an impossible position. It is unfair and unreasonable for the Plaintiff to expect that any expert could provide

a balanced and objective opinion when access to fundamental information is restricted. Alternative measures weigh in favor of production.

Privacy & Balancing

[43] It is well recognised that Plaintiffs have the right to privacy and autonomy over their personal medical records. The public interest demands that these rights not be easily pushed aside. There must be solid justification before a court permits the legal trolling of private medical records.

[44] The analysis under this heading is very contextual in that it requires a delicate balancing between the legitimate privacy interests of the Plaintiff and the Defendant's right to know the case to meet. Here, I am satisfied that the scale tips in favor of the Defendant.

[45] The additional information being sought is not exceptionally intrusive in the context of what has already been disclosed. Further, the Plaintiff has been very open about her historical knee injury, the diagnosis, and treatment sought. In fact, she relies upon it to suggest that her current injuries are solely the result of this accident. The Defendant's disclosure request is specific in both type and time. They do not cast a wide net. The Defendant has clearly articulated the purpose for which they wish to use the information. They have gone as far as to identify case-specific

evidence on why the historical records have gained relevance. While privacy considerations pull against production, there are reasonable limits in the context of this case.

Objectivity

[46] The court must consider the purpose for which the Defendant is seeking to use the information. The court must diligently consider whether the disclosure is sought for an unfair, collateral or nefarious purpose.

[47] The Plaintiff was given an opportunity to outline any prejudice which may result from production. In the course of answering this question counsel stated:

> My Lord, it is prejudicial because the Defendants … the Defendant expert hasn't yet reviewed the medical documentation and so I'd be speculating to say what the Defendant's expert is going to do but to a certain extent, My Lord, unfortunately these experts end up being hired guns even though they're supposed to be providing objective evidence for the Court…
>
> [Emphasis Added}

[48] After hearing this submission, the Court asked counsel to articulate what foundational support they had for the broad allegation that Defendant experts are "hire guns". Afterall, one of the criteria for being a properly qualified expert is impartiality and objectivity. Counsel somewhat retreated from their initial position. Nevertheless, the point was noted. At the end of the day, I do not accept the

unsubstantiated claim that Defendant experts are unobjective “hired guns”. There is nothing before me to suggest that this information, should it be disclosed, would end up unfairly distorting the litigation process.

Limits

[49] In short, given that the records sought are so specific, I do not think any special conditions are required to ensure the just, speedy and inexpensive determination of the proceeding. However, should the records contain personal information that is not related to the historical knee injury, the Plaintiff could redact this information. The Defendant endorses this approach as well.

Conclusion

[50] I am satisfied that the Defendant has met the onus of establishing that the requested medical records are relevant disclosure as defined under *Rule* 14.01. Having ruled that the medical records are relevant documents, I have gone on to consider whether the Plaintiff has discharged the burden of rebutting the presumption. For the collective reasons outlined above the Plaintiff has not.

[51] As a result, the court orders that the Plaintiff disclose the following documents to the Defendant:

1. A copy of the Plaintiff's physiotherapy records from Cabot Physiotherapy related to the 2007/2008 left knee injury;
2. A copy of any medical reports for treatment provided to the Plaintiff in relation to her 2007/2008 knee injury; and
3. Diagnostic imaging records relating to the Plaintiff's 2007/2008 left knee injury.

[52] The parties shall have 30 days from this decision to come to an agreement on costs. If there is no such agreement the parties will notify the court, and the matter will return for submissions.

Russell, J.