

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Gay v. UNUM Life Insurance Company of America - 2003 NSSC228

Date: 20031203

Docket: S.H. No. 137242

Registry: Halifax

Between:

Julie Frances Gay, by her guardian ad litem Patrick Gay,
Patrick Gay, Patrick William Elliott Gay

Plaintiffs

-and-

UNUM Life Insurance Company of America

Defendant

LIBRARY HEADING

Judge: The Honourable Justice Robert W. Wright

Heard: October 2, 2003 in Halifax, Nova Scotia

Written

Decision: December 3, 2003

Subject: C.P.R. 20.02 - application for production of expert reports disclosed prior to a mediation in a related proceeding - settlement privilege and litigation privilege.

Summary: The plaintiff was left in a seriously disabled condition after developing complications in her pregnancy for which she was treated in hospital. She subsequently brought a malpractice suit against the hospital and four attending physicians. She also brought a second lawsuit against UNUM under an employee group insurance policy under which she claimed accident insurance benefits.

With the trial dates in the malpractice suit approaching, the parties agreed to participate in a private mediation. Three weeks prior to the mediation, the defendant physicians disclosed to the plaintiff certain expert reports commissioned on their behalf expressing opinions on the issue of professional liability. The mediation proved to be successful and a consent order for judgment setting out the terms of settlement was taken out before the court.

Once that lawsuit was resolved, UNUM sought production from the plaintiff (represented by the same counsel in both proceedings) of these medical expert reports as a cost effective way of ascertaining the cause of the plaintiff's injury (UNUM's defence being that her condition was caused

by an illness rather than an accident). The plaintiff's counsel raised no objection of his own to producing the expert reports but considered that he was unable to do so in the face of a claim of settlement privilege which the defendant physicians in the malpractice action continued to assert. The privilege claim was based on a confidentiality clause contained in the mediation contract, and otherwise to be implied, whereby all communications between the parties, and the contents of mediation, were to be treated as privileged and made without prejudice in the pursuit of a settlement. The defendant physicians were granted standing to be heard on the present application.

Issues:

- (1) Are the medical expert reports from the previous litigation relevant in this action?
- (2) Are these expert reports privileged from production?

Held: Although the authors of the expert reports had nothing to do with the examination or treatment of the plaintiff, their reports undoubtedly would contain a review and analysis of the steps taken in the plaintiff's medical treatment and would thereby likely assist UNUM in a line of inquiry on the causation of the plaintiff's condition useful to its defence and/or settlement. The expert reports therefore fell within the semblance of relevancy test applicable at the pre-trial discovery stage.

In considering the second issue of settlement privilege, it was vital to differentiate expert reports from the class of documents normally falling within the ambit of settlement privilege, *viz.* admissions or concessions, or offers of settlement or compromise, made in pursuit of a settlement. The expert reports at issue here were commissioned not just for mediation purposes but for litigation purposes generally. Once they were disclosed to the plaintiff in the malpractice action, the confidentiality in the expert reports was lost regardless of whether their disclosure was earmarked as being without prejudice. Where litigation privilege was thus waived and the expert reports are to be distinguished from the class of documents protected by settlement privilege, the plaintiff's counsel was found not to be under a duty of confidentiality to the defendants in the malpractice suit and was therefore able, and indeed now required, to provide copies of the reports to UNUM in this action.

**THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S
DECISION. QUOTES MUST BE FROM THE DECISION, NOT THE COVER SHEET.**
