SUPREME COURT OF NOVA SCOTIA
Citation: *Warnell v. Cumby*, 2016 NSSC 356

Date: 20161026
Docket: Hfx. No. 412959
Registry: Halifax

Between:

Deborah Mary Warnell and Jamie Cyril Warnell

Plaintiffs

v.

David Carl Cumby and Barbara Cumby

Defendants

MID-TRIAL MOTIONS

Judge:	The Honourable Justice M. Heather Robertson
Heard:	October 26, 2016, in Halifax, Nova Scotia
Written Release:	March 30, 2017 (Orally: October 26, 2016)
Counsel:	Peter M. Landry and Craig L. Arsenault, for the plaintiffs Christa M. Brothers, Q.C., Christopher W. Madill and Sara Nicholson, for the defendants

Robertson, J.: (Orally)

[1] Is Dr. Ivan Wong's report dated July 6, 2015 admissible into evidence as a treating physician's narrative under Rule 55.14.?

[2] For opinion evidence within a treating physician's narrative to be admissible at trial pursuant to Rule 55.14(6) the physician must be made available for cross examination.

[3] Justice Boudreau's very thoughtful analysis on the admissibility of medical records and opinions reflects the current law in our court. In *Bezanson v. Sun Life Assurance Co. of Canada*, 2015 NSSC 1 she reasons at paras. 12-33.

> [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 <u>for the truth of its contents</u>, its admissibility must be carefully considered.
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> [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.
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> [14] The issue of medical or hospital records was specifically addressed in *Ares v. Venner (supra).* The question posed was whether nurses' notes were admissible for their truth in a malpractice proceeding against a physician, without the calling of each particular nurse (to introduce her own notes). The Court concluded that such were "business records" and *prima facie* admissible:
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> > Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or records should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and

> available to be called as witnesses if the respondent had so wished. (page 626)

[15] The Nova Scotia Court of Appeal considered the *Ares* case in *R. v. Wilcox* (2001), 192 N.S.R. (2d) 159. That case dealt with a ledger maintained by an employee of a fisheries company. The Court endorsed the following statement of the common law rule, set out in *R. v. Monkhouse* (1987), 83 AR 62 (C.A.):

> [23] In his useful book, *Documentary Evidence in Canada* (Carswell Co. 1984) Mr. J.D. Ewart summarizes the common law rule after the decision in *Ares v. Venner* as follows at page 54:
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> > The modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after *Ares* does reflect a more modern, realistic approach for the common law to take towards business duty records.
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> [24] To this summary, I would respectfully make one modification. The "original entry" need not have been made personally by a recorder with knowledge of the thing recorded…[I]t is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records…

[16] Most jurisdictions have now adopted legislation which formalizes the common law rule described in *Ares* in relation to business records. In Nova Scotia, Section 23 of our provincial *Evidence Act* RSNS 1989 c. 154 provides as follows:

> 23(1) In this Section,
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> (a) "business" includes any kind of business, profession, occupation, calling, operation of institutions, and any and every kind of regular organized activity, whether carried on for profit or not;
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> (b)" record" includes any information that is recorded or stored by means of any device.
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> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of any such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
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> …

> (4) The circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this Section, but such circumstances do not affect its admissibility.

[17] Having said this, the common law rule as set out in *Ares* survives. In *The Law of Evidence in Canada*, authors Sopinka, Lederman and Bryant note:

> …unlike the statutory business records provisions, the common law exception applies to oral as well as written statements, does not require the giving of notice and clearly allows for statements of opinion and subjective impressions. (at 6.199, 4th ed, Markham Ont:LexisNexis 2014)

[18] And further in that same volume:

> The subjective opinions of doctors and nurses contained in hospital records are inadmissible under the business record legislation, according to the *Bremner* case, but admissible at common law according to the *Ares* case. Thus, notwithstanding the existence of business record statutes in Canada, the decision in *Ares v. Venner* is of considerable practical importance.
>
> …As noted , the provincial business records provisions permit records of "any act, transaction, occurrence or event". There are no words of limitation so as to restrict the nature of the record, yet the courts have done so. Moreover, this narrow interpretation by the courts is not in keeping with the Supreme Court of Canada's expression of the common law exception which clearly encompassed statements of opinion. It is illogical to maintain a restrictive interpretation in respect of business records legislation. (6.229-6.230)

[19] The distinction between fact and opinion in medical records was addressed in the very recent case of *Gaudet v. Grewal*, 2014 ONSC 3542. In that case, the Plaintiff sought to introduce the written opinion of a doctor who had died prior to trial.

[20] The Court noted that a medical diagnosis is an "opinion", whereas data contained in doctors' notes and records is merely factual information. Therefore, the factual information contained in the document was admissible pursuant to the principled exception to the hearsay rule (and would also have been admissible as a business record under the Ontario *Evidence Act*). However, the diagnosis and opinions of the doctor were not admissible as business records. They were, in fact, partly admitted by way of waiver of the strict requirements of the expert evidence rules, <u>but not for their truth</u>.

[21] In *Tingley v. Wellington Insurance* (2008), NSSC 317, the Plaintiff sought to admit medical records prepared by physicians, without requiring the physicians to attend the trial and testify. The trial judge considered both *Ares* and *Wilcox*. He was satisfied that the physicians had:

> …a duty to record, not only their findings, but any statements by the plaintiffs, their observations of their condition, and any circumstances they recited concerning their condition and how it may have occurred. Having recorded the plaintiff's various statements, including their version of statements made to them by other physicians and persons with whom they had related, it was for the doctor, in preparing his opinion to assess the weight and reliance he/she placed on these statements. (para. 11)

[22] In relation to opinions expressed, the Court went on to say:

> [23] Here the opinions involve a large degree of subjectivity and are central to the ultimate issue. They are also challenged not only as to the opinions but as to the accuracy of the information relied on by the doctors, as appears from their reports, as well as their notes and charts, outlining the information that they were provided, and presumably may have considered in formulating their opinions. The challenge to the accuracy of the information they recorded is made by one of the plaintiffs during her testimony at trial. Without knowing the doctors positions on the notes and records they created, and whether, and, if so, to what extent they relied on what may have been inaccurate information, or at least misunderstandings, it can be said that the "prejudicial effect may outstrip the probative value".

[23] The Court in Tingley concluded:

> [38] There is a distinction to be made between physician's file materials, which are admissible in the manner described in *Ares v. Venner* and the Nova Scotia *Evidence Act*, and the physicians' opinions and expert reports, which require the witnesses to be available for cross-examination.
>
> [39] To the extent that the materials sought to be admitted are in the nature of records "made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record", they are, except to the extent challenged by the parties, admissible as *prima facie* proof of the facts stated in the records. While the phrasing differs somewhat, I am satisfied that such records are admissible under the hearsay exception described in *Ares* and under the *Evidence Act* provision for business records. Such records are subject to challenge as to their accuracy. This conclusion accords with the principles stated in Seaman, supra. As to opinions, I also follow Seaman in concluding that any opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.
>
> [40] As a result, the physicians files are admissible pursuant to the hearsay exception and pursuant to the *Evidence Act* to the extent that they state facts, subject to challenge as to accuracy. The weight of such records, however, will have to await all of the evidence, including an assessment of the extent their accuracy and reliability are challenged by the witnesses

> and the remaining evidence. **However, no opinions or diagnoses by the physicians are admissible for their truth. They may be admitted for the bare fact that they were made, and were available to other physicians with whom the plaintiffs consulted or were treated, but for no purpose beyond that.** (emphasis is mine)

[24] The Court in *R. v. West,* [2001] OJ No. 3413 made the following point:

> [63] There is of course a continuum of subjective opinionism with observations positioned at one end and conclusions clearly steeped in expert skills at the other. In some instances, observations of the expert declarant, while informed by a measure of special knowledge or expertise, are arguably little more than the expression of opinion permitted by a lay witness (*Ares v. Venner*, supra (skin color and relative temperature of skin); *H.(S.)*, supra (emotional condition of patient); *Regina v. Skrzydlewski*, supra (observations of patient behaviour); *Conley v. Conley*, supra (physical movements of subjects and opportunity for togetherness). On the other hand, some opinion statements are almost wholly the product of application of specialized skill and experience as in the hard science of forensic pathology: *Regina v. Larsen*, supra (cause of death as asphyxia)…

[25] In *Egli v. Egli*, 2003 BCSC 1716, the Court acknowledged that *Ares* had been interpreted to permit admission of "records containing clinical diagnoses for the truth of their contents" (para. 12). However, the Court repeated the "continuum of opinion" analysis as described in *West*, hereinabove:

> [a]t one end are opinions like those of the nurses in *Ares v. Venner*, and at the other are expert opinions that may not be admissible insofar as their prejudicial effect may outweigh their probative value. (para. 14)

[26] Further, the Court in *Egli* makes the point that the expertise and qualifications of the record keeper, as well as the nature of the opinions at issue, are significant factors:

> [16] Douglas Ewart in *Documentary Evidence in Canada* (Agincourt Ont: Carswell 1984) described the nurse's records admitted in *Ares v. Venner* as follows:
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> > To some extent these could be said to be opinions, since they dealt with observations of color and temperature. However, it should first be noted that the "opinions" were far from scientific or technical; indeed they seem much better characterized as observations rather than opinions…indeed the Supreme Court of Canada in *Davie Shipbuilding Ltd. v. Cargill Grain Ltd.* [1977] 1 S.C.R. 659, seems to have interpreted the notes in Ares as dealing with observations rather than opinions. Further, and more significantly, the Court in *Davie Shipbuilding* excluded a document because it consisted of unsubstantiated conclusions, rather than facts. It would seem to be inescapable that opinions are

> in the same class as conclusions, and are therefore not admissible under this exception to the hearsay rule.

[27] The Court in *Egli* concluded:

> [26] In the case at bar the opinions sought to be admitted for the purpose of proving the truth of the opinions are not straightforward or mechanical observation. The opinions are psychiatric in nature. They are steeped in the expert skills of a geriatric mental health worker. They are not akin to observations such as "blue toes" in *Ares v. Venner*. The opinions as to Hans Egli's "global assessment of functioning" his scores on the various mini mental status exams, and the diagnoses of his cognitive functioning are subjective opinions, requiring review of information, interviews, and deliberation of the author of the opinions. I have heard no evidence concerning the qualifications of the individuals who made the diagnoses and cannot therefore assess the degree of reliability that should be ascribed to the opinions. The diagnoses and opinions are central to the very issues upon which this case will be decided. The opinions which the plaintiff wishes to rely upon are not so numerous that they ought to be admitted for practical and necessary reasons. Furthermore the diagnoses made in the records, such as the diagnostic criteria from the psychiatric manual DSM IV, contain technical language that requires explanation…

[28] In other words, there is a clear distinction between the subjective observations admitted in *Ares v. Venner*, and opinions that are of a scientific or technical nature (see also: *Greenwood v. Syncrude Canada Ltd.* (1998), 235 A.R. 141; *Spectra Architectural Group Ltd. v. St. Michael's Extended Care Centre Society,* [2001] A.J. No. 1417).

[29] The case of *Seaman v. Crook,* 2003 BCSC 464 provides a good resume:

> [14] The cases…and s. 42(2) which provides: "In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if…", when taken together, stand for the following:
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> > (1) That the observations by the doctor are facts and admissible as such without further proof thereof;
> >
> > (2) That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof;
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> > (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth;
> >
> > (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth;
> >
> > (5) That the diagnoses made by a person to whom the doctor has referred the patient are admissible for the fact that they were made but not for their truth;

> (6) That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the clinical records as this is a judge alone trial.
>
> [15] Therefore any, and I emphasize the word "any", opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.

[30] I accept and adopt the clear statement of the law on this issue as can be found in the cases of *Tingley, Seaman, Egli,* and others. 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.

[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.

[32] I should note that the Defendant's exhibits also contain, within them, some medical opinion from persons who did not testify. They are subject to the same rules.

[33] To conclude: Any medical record, tendered by either party in this case, is admitted as a business records insofar as the <u>factual information</u> provided therein, or in respect of opinions that are merely observational in nature. Medical opinions, given by medical professionals within their area of expertise, are admitted only for the fact that the opinions were given. They are not admitted <u>for their truth</u>, unless the author of that opinion was called before the Court and properly qualified.

[4] Many of the observations she made were also supported in *Blake v. Dominion of Canada General Insurance Co.*, 2015 ONCA 165 at paras. 54-60.

> 54 When a document brief is tendered at trial, the record should reflect clearly the use the parties may make of it. Such use may range from the binder's acting merely as a convenient repository of documents, each of which must be proved in

the ordinary way, through an agreement about the authenticity of the documents, all the way to an agreement that the documents can be taken as proof of the truth of their contents. Absent an agreement by the parties on the permitted use of a document brief, the trial judge should make an early ruling about its use.

55 In his case, the trial judge clearly indicated at the commencement of the trial that that he would not treat a document contained in exhibit 1 as admitted evidence for his consideration unless a witness had referred to it or the document was admitted on consent. In my view, that was adequate notice to counsel that absent an agreement about a document, it would have to be proved in the ordinary course through a witness.

56 Although the import of that ruling initially seemed unclear to Ms. Blake's counsel, the events of the sixth day of trial should have resolved any uncertainty. On that day Dominion advised that it did not intend to file the reports prepared by Drs. Garner and Ghouse or to call those physicians to testify. Against that background, the trial judge advised that the admission of an expert opinion required the filing of the expert report, the calling of the expert or the agreement of counsel. Ms. Blake's counsel acknowledged that even if a report by a physician was treated as a business record, "the facts contained or the information contained in those reports are not offered as evidence" and the admission of the report would only establish their authenticity and authorship.

57 Those directions by the trial judge gave counsel fair notice that if they intended to rely on the opinions expressed by any medical practitioner, they would have to meet the ordinary rules governing the admission of such expert reports.

58 I see no error in the ruling made by the trial judge on the penultimate day of the trial that he would consider as evidence only those documents to which a witness had referred. That ruling was consistent with the directions he had given at the start of the trial and caused no unfairness to the parties.

59 The trial judge's refusal to treat the Designated Assessment Centre medical assessments prepared by Drs. Garner, Ghouse, and Meloff as business records under s. 35 of the *Evidence Act* followed the long-established principle stated by the High Court of Justice in *Adderly v. Bremner* that a professional medical opinion, including a diagnosis, is not an "act, transaction, occurrence or event" within the meaning of s. 35(2) of the *Evidence Act*.

60 Moreover, in his ruling the trial judge followed this court's decision in *O'Brien*, which held that merely filing a large volume of records -- in that case, the contents of a party's Workers' Compensation Board file -- pursuant to notice given under s. 35 of the *Evidence Act*, without more, was insufficient to establish the truth of the contents of each document in the voluminous file. Absent express agreement by opposing counsel to the use of large sets of documents for the truth of their contents, the tendering party would have to lead evidence about the nature of the records or the circumstances in which they were created.

[5] Unless the author of a medical opinion is called to the stand at trial, his or her opinion is not admissible under the business records exception to the hearsay rule, whether at common law (i.e. *Ares v. Venner,* [1970] S.C.R. 608 or by statute (i.e. the *Evidence Act*).

[6] So, when we look to Rule 55.14(1) it will tells us about the characteristics of a treating physician's narrative is:

> 55.14 (1) A party who wishes to present evidence from a physician who treats a party may, instead of filing an expert's report, deliver to each other party the physician's narrative, or initial and supplementary narratives, of the relevant facts observed, and the findings made, by the physician during treatment.

[7] In Rule 55.04(1) will give us direction about the content of an expert's report.

> 55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
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> (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
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> (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.

[8] Justice Scaravelli, of this court, has commented recently on Rule 55.04(1) and that was in *Shaw v. J.D. Irving*, 2011 NSSC 487. At paras. 4-13.

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

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

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

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

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

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

Physician's Narrative Dated June 2005

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

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

12 The physician narratives were delivered to the defendant in March of 2008. The physician's notes, as well as her report to Dr. Harper, were made during the course of treatment and not in the context of litigation. Her notes disclose relevant facts observed and findings relating to carpal tunnel compression. In my view, her notes contain sufficient information to support her opinion that carpal tunnel could have been either initiated or worsened by the accident. Dr. Skanes will be subject to cross-examination regarding her notes and opinion, including her

> degree of certainty. Whether a causal connection has been established by this evidence is for the court to decide at trial.
>
> **June 2010 Report**
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> 13 This report is identified as a "medical/legal type report" and responds to requests from plaintiff's counsel for a medical/legal type report. This report was provided in the context of a pending trial and not within the context of a physician's narrative during treatment. Moreover, the report delivered to the defendant 10 weeks prior to trial is unequivocal as it relates to causation. Under the circumstances, I do not view this report as a physician narrative. To admit this report into evidence would, in my view, circumvent the rule relating to expert opinion. As a result, the report containing expert opinion fails to comply with Rules 55.03 and 55.04 relating to mandatory time lines for filing and contents.

[9] Now, it is interesting Justice Scaravelli was faced with the much the same kind of document I have reviewed. The document itself, Dr. Wong's report of July 6th is dressed up as a medical legal type of report. It responds to plaintiffs' counsel's questions to attempt to provide an expert opinion. It was prepared in the context of a pending trial. It is not prepared within the context of a physician's narrative during treatment. It has been in existence for a year prior to trial with objection being made by defence counsel that it did not meet the requirements of Rule 55.04(1).

[10] Nor is the report a narrative of the relevant facts and observations and findings made by a physician during treatment pursuant to s. 55.04(1).

[11] This report just focussed on Dr. Wong answering specific questions posed to him by you Mr. Landry and he offers opinion evidence on a variety of issues without any meaningful medical review of his patient's file.

[12] I am in agreement with defence counsel as set out in written argument their concerns with this report. It seems to me Mr. Landry, it was your goal to tender an expert report not having met all the requirements of Rule 55. And, you asked Dr. Wong to comment on (1) the disabling nature of a labral tear (2) the cause of labral tear and their relationship to trauma (3) signs and symptoms of labral tears (4) his experience in regard to the characteristics and average time for a trauma to be diagnosed (5) whether Mrs. Warnell's history and symptoms were explained before Dr. Wong, made his diagnoses of labral tear (6) what the surgery carried out by Dr. Wong revealed and lastly, Dr. Wong's prognosis.

[13] It is important to recognize that none of these issues are detailed in the narrative records authored by Dr. Wong during his treatment of Mrs. Warnell.

When you look at the records that we do have now admitted into evidence, these speak for themselves. These include the reports Dr. Wong authored and forwarded to Dr. Edmonds, the general practitioner. They are of course subject to all of the rules that have been set out in the *Bezanson* case.

[14] So, this report of July 6, 2015, goes well beyond what was done in treatment. It expresses opinions of causation, prognosis, disabilities, symptom presentation and the temporal connection between trauma and diagnosis and impairment.

[15] It does not speak to the relevant facts observed and findings made by Dr. Wong during his treatment. They are just birds of a different feather. It is not a treating physician's narrative. The report is an expert opinion that speaks to many of the kind of central issues involved in the case. It was produced a couple of years after Mrs. Warnell's surgery and it was produced in response to Mr. Landry's questions to Dr. Wong. The report was produced for the purpose of litigation.

[16] It is not an admissible Expert's Report. Mr. Landry had the opportunity to order an Expert Report to be authored by Dr. Wong, but elected not to do so. The plaintiff is therefore attempting to enter expert opinion evidence through the back door, which clearly did not fit through the front door.

[17] That brings us to the balance of your motions.

[18] With respect to the second motion: whether the plaintiffs should be permitted to call rebuttal evidence and if so, should the plaintiffs be entitled to enter Dr. Wong's report in rebuttal and would the court agree to an adjournment to call Dr. Wong?

[19] Mr. Landry, you seem to be saying to the court "well these Rules are just administrative and there is a bigger principle at stake here and I need this report in and you should allow it in and that would achieve justice in the case." In fact, I would say to you that our *Civil Procedure Rules* reflect a very serious regard for the common law rules and for the case law that has developed in our country respecting the admission of evidence into court. Our Rules reflect a very reasonable understanding of how evidence should be introduced in court in an orderly fashion so as not to create surprise – to allow both parties to prepare for their case and to answer their case and to have ample opportunity to reply to issues that might arise during the litigation. Adherence to Rule 55 is essential to orderly litigation.

[20] In my view that this not a proper rebuttal evidence – not a true rebuttal. This would amount to the plaintiff splitting its case. The jurisprudence is very clear that the plaintiff must enter any evidence while presenting his case in chief and must not split his case. The defendants are entitled to know the case that they have to meet against them and properly respond to it. And, that is what Rule 55 addresses.

[21] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Toronto: Butterworths, 2014) states at page 1190:

> At the close of the defendant's case, the plaintiff or Crown has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff's case in chief.
>
> . . .
>
> Two very practical rationales for this rule were articulated by Wigmore:
>
> . . . first, the possible unfairness of an opponent who has unjustly supposed that the case in chief was the entire case which he had to meet, and second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in beginning.

[22] I agree with defence counsel's views that the broad principle which forms the basis for a restriction on reply evidence are that the defendant is entitled to know the case to be met and it is contrary to the judicial process to permit the plaintiff to split its case. The Supreme Court of Canada addressed this in *R. v. Krause,* 1986 CarswellBC 330 at para. 16:

> The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

[23] The defence counsel has also acknowledged *Allcock, Laight & Westwood Ltd. v. Patten*, 1966 CarswellOnt 151 (C.A.); *Dunrite Contracting Ltd. v. Christians*, 1996 CarswellNS 261; and *Seiler v. Mutual Insurance Co. of British*

Columbia, 2003 CarswellBC 2284 – all helpful cases having to do with case-splitting and rebuttal evidence.

[24] Plaintiffs' counsel cannot leave a part of its case until after cross examination of a defendant's witness and then when that does not go so well seek to make a reply. Rebuttal might be warranted if there were new facts arising or new issues that raised by the defence, but that is not the case here Mr. Landry. There is nothing arising out of Dr. Gross' evidence that is in his report or in the cross examination that I heard that you could not have reasonably anticipated. You have had that report for a very long time – since 2014. And, you could easily have led evidence as part of your case in chief and ought to have done so.

[25] So, I am of the view that this is not appropriate rebuttal evidence. It amounts to splitting your case and you will not be entitled to enter Dr. Wong's report in rebuttal. And, flowing from that I am also of the view that an adjournment at this time is inappropriate. You had the opportunity – you had Dr. Wong on your witness list, you took him off, you chose not to call him. And in any event, the reason you wish to call him is to attempt to introduce the report of July 6, 2015 which so clearly does not meet Rule 55 in anyway – not as a physician's narrative and not as expert evidence.

[26] So, I am denying your motions.

Robertson, J.