SUPREME COURT OF NOVA SCOTIA

Citation: *Halliday v. Cape Breton District Health Authority*, 2017 NSSC 201

Date: 2017-07-25
Docket: Sydney, No. 307567
Registry: Sydney

Between:

Jennifer Halliday

Plaintiff

v.

Cape Breton District Health Authority

Defendant

Motion Decision

Judge:	The Honourable Justice Robin C. Gogan
Heard:	March 27, 2017, in Sydney, Nova Scotia
Written Decision:	July 25, 2017
Counsel:	Christopher T. Conohan, for the Plaintiff Rick M. Dunlop, for the Defendant

By the Court:

Introduction

[1] Jennifer Halliday was an employee of the Cape Breton District Health Authority. She was hired on April 1, 2003. Halliday alleges that she was constructively dismissed in the fall of 2008. She sues for various damages. The Health Authority denies liability.

[2] This matter will proceed to Trial commencing November 27, 2017. The finish date is September 1, 2017. By virtue of *Civil Procedure Rule* 55, all expert opinions were due on or before March 1, 2017.

[3] The Health Authority moves for a ruling on the admissibility of various documents which Halliday seeks to rely on at Trial as treating physician narratives. This is a decision on the motion.

Background

[4] On January 27, 2017, the Health Authority initiated this motion. At that time, the motion related to Halliday's intent to rely on a report of Dr. Neil Christians dated September 25, 2012. The Health Authority objected to this

document as both an expert report or a treating physician's narrative. The motion was originally scheduled to be heard on February 27, 2017.

[5] On February 23, 2017, Halliday advised the Health Authority that it intended to rely upon the entire medical file of Dr. Neil Christians as a treating physician narrative. Halliday's affidavit and motion brief were filed on February 23, 2017. Given the late filing of the materials and the change in the scope of the motion, the Health Authority requested an adjournment. The adjournment was granted and the matter scheduled for hearing on March 27, 2017.

[6] On March 24, 2017, Halliday advised that she no longer intended to rely upon the report of Dr. Christians as an expert report or treating physician's narrative. However, she confirmed an intention to rely on the medical file (along with typed transcription).

[7] The motion hearing proceeded on March 27, 2017. The sole contentious issue by that time was whether the contents of the medical file of Dr. Neil Christians, (along with typed transcription) were admissible at Trial as a treating physician's narrative pursuant to *Civil Procedure Rule* 55.14.

Issue

[8] Is the content of the medical file of Dr. Neil Christian's a treating physician's narrative under *Civil Procedure Rule* 55.14?

Position of the Parties

The Cape Breton District Health Authority

[9] The Health Authority submits that the contested portions of the medical file do not meet the criteria set out by Duncan, J. in *Russell v. Goswell*, 2013 NSSC 383. In short, the contested content does not set out the relevant facts observed, does not set out the findings made and were not findings arrived at during treatment. The Health Authority sets out submissions respecting specific portions of the medical file at pages 7 to 30 of its Supplementary Brief dated March 27, 2017.

Halliday

[10] Halliday responds that the entirety of the content of Dr. Christians file should be admissible at Trial as a treating physician's narrative pursuant to *Civil Procedure Rule* 55.14. It argues that the documentation was provided to the Health Authority early enough in the proceedings to comply with the *Rule* and the

reasons of Scaravelli, J. in *Shaw v. JD Irving Limited*, 2011 NSFC 47. It further argues that the material substantively complies with the reasons of Rosinski, J. in *Bruce v. Munroe* [2016] NSJ No. 515.

Analysis

The Rule - Civil Procedure Rule 55

[11] This motion is brought under *Civil Procedure Rule* 55.15 seeking an advance ruling. An advance ruling requires consideration as to whether the physician's narrative contains sufficient information to permit a treating physician to testify to an opinion stated in the narrative without delivering an expert's report.

[12] Admissibility of such narrative reports and reliance on any opinions within them require compliance with *Rule* 55.14 which provides:

> Treating Physician's Narratives
>
> 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 or supplementary narratives, of the relevant facts observed, and the findings made, by the physician during treatment.
>
> (2) A narrative, or initial or supplementary narratives, must be delivered within the following times:
>
> (a) no more than thirty days after the day pleadings close in an action, if the treatment occurs before the action is started;

> (b) within a reasonable time after treatment is provided during the course of an action and no later than the finish date;
>
> (c) as directed by a judge in an application.
>
> (3) A party who receives a narrative, initial narrative, or supplementary narrative expressing a finding may, within a reasonable time, file a rebuttal report that conforms with Rule 55.05.
>
> (4) …
>
> (5) A party who calls a treating physician at trial, or presents the affidavit of a treating physician on an application, 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.
>
> (6) A judge who presides at the trial of an action, or the hearing of an application, or who makes a determination under Rule 55.15 must exclude expert opinion evidence of a treating physician who provides a narrative instead of an expert's report, unless the party offering the evidence satisfies the judge that the other party received information about the opinion, and upon the material facts upon which it was based, sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician.

[13] Before proceeding further with the analysis, several preliminary observations can be made.

[14] First, the admissibility of opinion evidence from a treating physician who does not file an expert report must be determined with reference to compliance with *Rule* 55.14. Second, *Rule* 55.14 contains both procedural and substantive considerations. Third, the analysis of compliance with *Rule* 55.14 is contextual. By that I mean that it requires an appreciation of the place where treating

physician's narratives reside within the entirety of *Rule* 55 and our general rules dealing with expert opinion evidence.

[15] Treating physician's narratives are a clearly carved out exception to the general rule which prescribes the basis for the introduction of expert opinion evidence at Trial. The exception must be strictly construed. The onus lies on the party advancing the evidence to establish that it falls within the exception. It is perhaps useful to point out that the physician's observations, treatment and findings that do rise to opinions may be admissible outside of *Rule* 55. It is the inclusion of opinion evidence that the party seeks to rely on at Trial that invokes consideration under *Rule* 55. 14

The Law

[16] The parties rely on a series of decisions which provide direction on the admissibility of treating physician's narratives.

[17] Early consideration of this issue came from Scaravelli, J. in ***Shaw v. J.D. Irving Limited***, 2011 NSSC 487. The reasons in ***Shaw***, *supra*, highlighted the manner in which treating physicians narratives were distinguished from expert's reports and emphasized that such narratives must still be excluded unless the party offering the evidence complies with *Rule* 55.14(6). In ***Shaw***, the proposed

evidence was excluded because it was disclosed only 10 weeks prior to trial and opined on causation. Scaravelli, J. observed:

> [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.

And then concludes:

> [13] …Under the circumstances, I do not view this report 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.

[18] In ***Russell v. Goswell***, 2013 NSSC 383, Duncan, J. gave the issue further consideration. In that case, the plaintiff sought to introduce five letters written by the treating physician to legal counsel and a section B insurer. Each letter was assessed under the criteria in *Rule* 55.14 formulated as questions to be answered:

> 22 So, the three questions to be asked about each letter are:
>
> 1. Does it set out relevant facts observed?
> 2. Does it set out findings made? And
> 3. Were the facts observed and findings arrived at, made during treatment?

[19] Justice Duncan noted the importance of the contrast between expert opinion evidence and treating physician's narratives and concluded that the exclusion created for treating physician's narratives be strictly construed:

> In this case the plaintiff's objective is clearly a desire to tender a series of expert opinions provided by Dr. Bower, without having to meet the requirements for admission of opinion in the form of an expert report. The differences between the criteria for admission of an expert report and of an opinion in a treating physician 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, any circumvention of Rule 55.04.

[20] In ***Russell***, the none of the letters were admissible as treating physician narratives for various reasons.

[18] More recently, consideration was given to the admissibility of treating physician's narratives in ***Bruce v. Munroe***, 2016 NSSC 341. In that case, the dispute concerned a number of referrals made by the plaintiff's treating physician which contained a variety of statements. The defendant objected to the admission of the opinions contained in the referrals.

[19] In his decision, Rosinski, J. adopts an extensive passage from the reasons in ***Bezanson v. Sunlife Assurance Co. of Canada***, 2015 NSSC 1 (see paras. 19-33) as to the dividing line between factual information and opinion evidence, a line that is at times less than clear in the case of reports given by treatment providers. I

likewise find this passage instructive. Justice Rosinski concludes this aspect of his decision with the following:

> 21 Consequently, the expert opinion evidence suggested to be contained in the treating physician narrative must not be ambiguous, and must be based upon the treating physician being a properly qualified expert, having made his or her factual observations and findings regarding the patient during treatment.
>
> 22 In my 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.

[20] The reasons in ***Bruce v. Munroe***, also speak to the underlying rationale at play:

> 11 It must be recalled, that at trial, treating physicians narratives stand essentially as the direct evidence of the physician. They are available for cross-examination by the other party. However, the reality is that physician's chart notes, and similar notations are made for use in medical circles, not for purposes of litigation. They are largely written in a manner that is very informal, brief and intended to be private, and primarily for the purposes of the treating physician. Understandably, physican's attempt to be efficient in their time, particularly in relation to taking any unnecessarily long time to complete notations of their observations, findings, and provisional diagnosis regarding their patients.
>
> 12 CPR 55.14 was intended to be a compromise between unduly requiring treating physician's to attend at trials and comply with the formalities regarding preparation and filing of expert opinion reports, yet still having the benefit of their findings, observations and to some extent expert opinion evidence available by virtue of making admissible narratives that properly conform to CPR 55.14 as treating physician's narratives. Thus, apart from their testimonial confirmation of the content in the treating physician's narrative, they need only be present for cross-examination thereon (CPR 55.14(5)).

[21] In ***Bruce v. Munroe***, the treating physician's referral letters were ruled inadmissible as treating physician's narratives.

Determination

[22] What remains then is a determination in the present case. The plaintiff seeks to introduce the entire content of Dr. Neil Christians medical file. There is no issue taken with the fact that Dr. Christians is a treating physician. Dr. Christians is a psychiatrist that treated Halliday. No issue is taken with his qualifications.

[23] As a preliminary point, I note that what has been produced is the patient file, including the patient chart. The chart contains the brief handwritten notes (later transcribed) or computerized notes made by Dr. Christians referring to each visit. The patient file contains the chart as well as other documentation such as assessment tools, worksheets, questionnaires, checklists and reporting letters to the family physician.

[24] I note that Halliday has not identified the specific opinions she seeks to rely upon at trial. She simply argues that the entire content of the file, including any opinions should be admissible as a treating physician narrative. In my view this approach is problematic when one considers the required assessment set out in the cases relied upon by both parties. It is even more problematic when one considers

that the onus is on the party seeking to introduce these documents and rely on the opinions contained within them.

[25] The contents of Dr. Christians medical file was disclosed to the Health Authority on January 29, 2015. The handwritten portion of the chart was difficult to read and upon being advised of Halliday's intention to introduce the file and proffer the included opinions, the Health Authority made a request to have the notes transcribed. The transcription was provided on March 15, 2017.

[26] The contentious content of the file relates to treatment in the period from March 28, 2009 until May 31, 2014 and includes a total of approximately fifty chart notes, assessment tools and narrative reporting letters. Given the treatment dates and the date the litigation commenced (February 17, 2009) I observe that the disclosure of these materials may not comply with Rule 55.14(2). As no objection was taken to the documents on that basis, I move on.

(a) *Assessment Tools*

[27] As to the various assessment tools (checklists, inventories, questionnaires and worksheets) in the file, these appear to be recordings of patient reports. They are not observations made by the treating physician during treatment, do not appear

to contain any opinions of any kind and do not constitute treating physician's narrative.

(b) *Chart Entries – Transcribed and Computerized*

[28] The content of Dr. Christians' file includes two types of chart notes. The first type are handwritten in their original form and subsequently transcribed. The date range for these records is from March 28, 2009 to February 4, 2010. The second type of entry appears to be computer generated records in a standardized format. These entries begin on April 15, 2010 and conclude on May 31, 2014. All chart notes briefly summarize the essential aspects of an office visit that took place with Halliday.

[29] With respect to the first type of chart note, each of the twelve individual entries were assessed with the relevant questions in mind. Each of the entries record an office visit in a very abbreviated manner. The notes are in point form and not narrative form. They largely consist of background information or other forms of reports by Halliday recorded during the visits. There are some scant observations. There are references to the treatment prescribed following several of the visits. I could not identify any opinions expressed in these entries. If there

are opinions, I conclude that these records are not admissible as treating physicians narrative.

[30] The second type of chart entries differ from the first in that they are in partial narrative form. There are a total of thirty such entries. Each entry generically refers to an "assessment" and a "status" for the date on which the patient visit took place. On every date, information has been entered under both "assessment" and "status". In my view, the information entered as "assessment" and "status" are opinions if the intention is to rely upon them for their truth. There is no question that these are diagnostic opinions formed by Dr. Christians in the course of his treatment. Reading all of these chart notes in sequence, one gets a sense of the treating physician's evolving assessment and overall approach to treatment.

[31] The difficulty with these entries is that they are cryptic assessments which do not attempt to specifically explain the basis for the opinions formed. Clearly, these records were not generated as anything more than a patient record. They were not intended to someday satisfy even limited litigation requirements. Rather, a reading of the entries reveal that they were intended to record patient reports, observations, particulars of therapy, treatment and ongoing impressions as to diagnosis and status in an abbreviated way.

[32] Many of the chart notations briefly summarize the discussions that took place between Halliday and Dr. Christians as part of his course of therapy (i.e. CBT) or with a view to preparing reports. More will be said about the report preparation later in these reasons. For now I note that these entries refer extensively, and are in some instances dominated by, Halliday's self-reporting. It does not appear to me that the records contain much in the way of observations made during treatment that can be extracted from the considerable volume of patient reporting. Moreover, it is not clear what observations that Dr. Christians made or relied upon in his ongoing assessment. This is not a criticism of Dr. Christians or his records, it is simply a reflection of the type of records generated and their purpose. It does however, speak to the requirement that the report must contain sufficient information to satisfy *Rule* 55.14(6). In my view, none of these chart notes are compliant from this perspective.

[33] I have contemplated the possibility that Dr. Christians made professional observations and findings based upon the considerable self-reporting and conversational therapy with Halliday. In the psychiatric context, a common sense approach dictates that the observations and findings of the treating physician would be driven to some extent by patient reporting. Unfortunately, with limited exceptions, it is not clear what specific observations, conclusions or findings

formed the basis of the opinions expressed in these records. Nor can one determine what expertise may have been applied to such patient reports in order to distill them, or some aspect of them, into material observations.

[34] Some of the chart entries during this period reference a diagnosis of post traumatic stress disorder related to workplace events. These are the very events that are at issue in this proceeding. It is clear that Halliday seeks to rely upon Dr. Christians' diagnosis of PTSD and his opinion as to causation. The only relevant observations recorded during treatment are of Halliday becoming tearful when she recounted certain events to Dr. Christians and avoidance of certain people and places. The rest of the information referenced in these entries is Halliday's reporting of the relevant events. I find that the chart notes referencing a diagnosis of PTSD do not contain sufficient information to comply with *Rule* 55.14(6). Further, I find that any opinion as to the cause of such a condition is beyond the scope of a treating physician narrative. Any opinion on causation should comply with *Rule* 55.04.

[35] On a related note, a reading of the chart entries reveals that a series of office visits were dedicated to obtaining sufficient information to prepare a report at the request of counsel. There was a request for Dr. Christians to express an opinion on

bullying in the workplace and several entries reference this topic related to PTSD. By example, the chart entry dated July 30, 2011 says:

> Unfortunately, I have been extremely busy and was not able to proves (sic) the issue of bullying. However, she knows that it will go to court as she feels that is element of injustice. I said that I would have to do my homework well before presenting a report on how to work (sic) did effect her. She clearly has some features of posttraumatic stress in relation to what is happening. She was the one who gave the best to work and recognize that the work did damage her. Even when she speaks about it now she is tearful. In other words, it definitely effected her. She does have flashbacks but is not the typical PTSD. She is reasonably stable on the Pristiq 100mg daily. The session was basic detailing how we would address the medicolegal aspect.

[36] Following this entry, Dr. Christians' assessment is "depression" and status is "chronic". In a later entry dated March 20, 2012, Dr. Christians once again notes that he, "will be putting a case together of PTSD related to the incidences". And on August 20, 2012, the chart entry says:

> We need to write that report on PTSD to her attorney. I explained to her that I was on a course and would not be able to do it tonight. We will set (sic) to do some further collection of information. She is aware of the features of PTSD. She would also have to understand the non-traumatic form of PTSD. I suggested that she write down what the traumatic events were, triggers that remind her of the traumatic events, reexperienced list of complaints and issues that she tends to avoid. It would be compatible with and (sic) nontraumatic PTSD as described in the British medical journal.
>
> She is exhausted as she is working long hours. She avoids any place such as a hospital. If she has to go to do an assessment at any of the homes she will do it in the evening. She's fearful of those 2 ladies the one who traumatized in (sic) the one who failed to support her.
>
> The session was mostly of a supportive nature. Next month we will draft the report for the attorney proposing to PTSD….

[37] These chart references clearly show instances of interaction between Halliday and Dr. Christians for the purpose of providing an opinion for litigation purposes. There is nothing nefarious in this. It simply exhibits that the purpose of some of the interaction was outside the course of treatment. Opinions developed in this context are beyond the scope of a treating physician's narrative and should comply with *Rule* 55.04.

[38] One final comment on this point. It is important to keep in mind the purpose underlying the exception created for treating physicians opinions. In many instances, information from a treating physician is relevant and probative of some issue before the court. The obligations imposed by *Rule* 55.04 are sometimes viewed as onerous by physician's with busy medical practices and heavy patient loads. These doctors are focused on treating patients, not on writing reports that are compliant with rules of court or evidentiary obligations.

[39] Treating physicians are focused on patient care and produce records in the course of their professional obligations. In this context, there is very little controversy around their qualifications and reduced risks of bias or lack of objectivity in opinions formed in the course of treatment. For these reasons, it is appropriate to allow this kind of opinion by way of the treating physician's

narrative. However, when the interaction between patient and doctor moves beyond therapeutic purposes and into research and development of opinions beyond treatment, those opinions must comply with *Rule* 55.04. This will 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.

[40] For the reasons canvased, I find that the computerized chart notes are inadmissible as treating physician's narrative reports. These chart notes, or parts of them, may be admissible for other reasons, but to the extent that the records contain opinions as to diagnosis or causation, I find them not compliant with *Rule* 55.14 and inadmissible.

Narrative Reports – Reporting letters

[41] Dr. Christians' file contains several narrative reports. Counsel previously agreed that the letter dated September 25, 2012 from Dr. Christians to Halliday's lawyer is not treating physician's narrative.

[42] There are two remaining letters which Halliday seeks to rely on under *Rule* 55.14. The first is dated May 20, 2010 and is a reporting letter to Halliday's family physician. The second appears to be a reporting letter dated July 11, 2010 from

Dr. Christians to Dr. Myatt but in fact is more in the nature of an expanded chart note.

[43] The May 20, 2010 reporting letter provides an opinion that Halliday, "*still has some features of post traumatic stress related to what was done to her when she worked at the Hospital*…". I find this to be an opinion outside the scope of treating physician narrative and therefore inadmissible on this basis.

[44] Finally, I am prepared to allow the letter dated July 11, 2010 as a treating physician's narrative. It contains a tentative diagnosis and relates this diagnosis to a list of symptoms evolving out of a course of treatment. This is compliant and admissible.

Conclusion

[45] In conclusion, with the exceptions noted, I find the contents of Dr. Christians' file inadmissible as treating physician's narrative under *Rule* 55.14.

[46] If the parties cannot agree on costs, written submissions may be made on or before August 31, 2017.

[47] Order accordingly.

Gogan, J.