SUPREME COURT OF NOVA SCOTIA
Citation: *Banfield v. RKO Steel Ltd.*, 2017 NSSC 315

Date: 20171207
Docket: Hfx No. 415476
Registry: Halifax

Between:

Thomas Banfield

Plaintiff/Applicant

v.

RKO Steel Limited, a body corporate

Defendant/Respondent

Judge:	The Honourable Justice James L. Chipman
Heard:	December 1, 2017, in Halifax, Nova Scotia
Written Release:	December 7, 2017
Counsel:	Kevin A. MacDonald, for the Plaintiff Jack Graham, Q.C., Michael Murphy and Elissa McCarron (Articled Clerk) for the Defendant

Orally by the Court:

Introduction

[1] The matter is scheduled to proceed to a 12 day jury trial beginning at 2 p.m. on Monday. In advance of the trial, I conducted a Pre-Trial Conference with counsel on November 23, 2017. During the Pre-Trial Conference it became apparent that there were a number of outstanding issues requiring attention before the start of the trial. These issues were outlined in my November 23, 2017, email to counsel:

> Dear Counsel,
>
> I refer to today's PTC and look forward to receiving any Motion materials in advance of Dec. 1/17 @ 11 a.m. Absent agreement on Dr. Carey's file, I would ask Mr. MacDonald to early next week provide me (copy to Mr. Graham) with a complete copy of the portions of the file that he suggests should be presented to the Jury. In addition, I await receipt of:
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> the proposed witness order and timing;
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> my copy of the Joint Exhibit Book with agreed upon pages/tabs inserted;
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> update on the Manulife settlement particulars together with agreement, if any, on what will be received by the Jury;
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> absent agreement on the witnesses to be called, the Plaintiff's Motion materials by Nov. 28, so the Defendant can respond by the end of the next day;
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> absent agreement on Dr. Carey, the Plaintiff's Motion materials by Nov. 28, so the Defendant can respond by the end of the next day;
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> update on the quantification of special damages and agreement, if any;
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> proposed questions for the Jury and absent agreement, your respective submissions.
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> Following our PTC it occurred to me that the above two Motions should be heard before the start of trial. I realize the Nov. 28 and 29 dates were not stipulated when we met; however, upon reflection, it seems the only reasonable way to proceed. I would add that if either of you have other Motions you feel need to be advanced before the beginning of trial – subject to my ruling that they should indeed be heard on Dec. 1 – we will follow these deadlines.

[2] On the topic of the Motions, they are at the initiative of the Court, notwithstanding that the Finish Date has long passed. In keeping with the Rules and caselaw, I must state at the outset that these motions are the exception rather than the rule, coming as they do on the eve of trial. In this regard I refer to *Garner v. Bank of Nova Scotia*, 2014 NSSC 63 at para. 23 and 24:

> Our present *Civil Procedure Rules* contain a different regime. Trial dates are now provided much earlier in the process, before the parties are ready for trial. At the Date Assignment Conference, the court fixes a Finish Date which is the date by which *all* pretrial procedures are to be completed (see Rule 4.16(6)(c)). A party who intends to make a pretrial motion that may materially affect a forecast of trial readiness, must, before the Date Assignment Conference, fully inform themselves regarding how much time it will take for the motion to be presented and must, at the Date Assignment Conference, advise the judge of the nature of the intended motion, the intended evidence in support of the motion, the plan for proceeding with the motion and a proposed deadline by which all documents will be filed (see Rule 4.16(4)). Counsel then have an obligation to insure that the case is trial-ready by the time the Finish Date arrives.
>
> There will be occasions when an unexpected issue arises which may require a motion after the Finish Date and prior to the trial. Examples include a motion for an adjournment due to unexpected circumstances or a motion to amend a witness list. In my view, these motions should be the exception rather than the rule. Our present system is designed so that *all* pretrial procedures are completed by the Finish Date. When that date arrives, counsel should be ready for and prepared to proceed to trial without further pretrial motions.

[3] In this case I have permitted the Motions as I am of the view that it is important to determine the outstanding issues in advance of convening the jury so that the parties will understand the playing field going into the trial. Further, by proceeding in this matter, we will avoid potentially lengthy periods within the trial requiring the jury to be absent. I would add that both sides appear to be content with this approach.

[4] On November 28, 2017, the Plaintiff/Applicant filed his Notice of Motion requesting leave of the Court:

1. To add two witnesses to the Plaintiff's trial witness list;
2. Direction from the Court as to the admissibility in part or the entirety of Dr. Carey and other medical records related to the Plaintiff; and
3. Direction of the Court as to the appropriate information to be provided to the jury regarding the income replacement received by Mr. Banfield,

> pursuant to the Manulife disability group police in the total amount of $4,100.

[5] At the outset of this hearing it was agreed that the third issue would be put off until our on the record (second) Pre-Trial Conference later this afternoon.

[6] On November 28, 2017, the Plaintiff also filed an affidavit on behalf of Mr. Banfield, brief and authorities.

[7] Given that the Applicant did not provide copies of the Motion documents to the Defendant until November 29, I permitted the Defendant/Respondent until noon on November 30 to file their submissions. Accordingly, yesterday morning the Court received from the Defendant two briefs, a book of authorities and affidavit of one of the Defendant lawyers, Michael Murphy.

[8] Today I heard oral argument from counsel. Neither affiant was cross-examined. On the basis of the evidence, argument, Rules and caselaw and given the tight timeline of the scheduled start of the jury trial on Monday afternoon, I am now prepared to render my reasons.

Issue One - Whether to add two witnesses to the Plaintiff's Witness List

[9] In addressing this aspect of the Motion I first return to *Garner* and Associate Chief Justice Smith's review of the law and test at paras. 37 – 40:

> Civil Procedure Rule 4.18 deals with witness lists and provides:
>
> Witness List
>
> 4.18 (1) A party must, before the finish date, file a list of the witnesses the party intends to call at trial, except a witness the party will call only to impeach the credibility of another expected witness.
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> (2) A party may only call at trial a witness named on the party's witness list, unless the witness is called only to impeach the credibility of another witness or the trial judge permits the party to call the witness in order to avoid an injustice.
>
> (3) A party who determines to seek permission to call a witness not on the party's witness list must immediately notify all other parties and the trial judge of the determination and the grounds for asserting that the witness must be called in order to avoid an injustice.
>
> (4) A judge who permits a party to call a witness not on the party's witness list may order the party to indemnify each other party for expenses resulting from the permission, including expenses resulting from an adjournment if that is a result.

...

Wood, J. considered this Rule in *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 155, where he stated at para. 36:

> Witness lists provide notice to the other parties of the potential evidence which will be presented at trial. The exchange of lists should help identify any problems with the sufficiency of the time allocated for the trial. It is an important step, and one the parties and counsel must take seriously. This is emphasized by CPR 4.18(2) which provides that a party should only be permitted to call a witness not on the list if a judge decides it is necessary to do so in order to avoid an injustice.

Justice Wood listed a number of factors which he felt should be considered when dealing with a motion to amend a witness list. These factors include:

- the significance of the witness's evidence and whether it is simply corroborative of other evidence which will be presented.
- whether the witness and their potential evidence was known or ought to have been known prior to the delivery of the parties' witness list.
- the explanation for the failure to include the witness' name on the witness list.
- the prejudice, if any, to the other party arising from the failure to give timely notice of the witness' name.
- the impact on the trial and, in particular, whether the evidence can still be completed within the allocated time.

In the subsequent decision of *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 325, Wood, J., dealing with the same issue, concluded that the primary consideration when dealing with a request to amend a witness list is the relative prejudice to the parties (see para.16).

[10] In his affidavit Mr. Banfield provides an explanation for leaving one of the two witnesses, Lynne Smith, off his Witness List filed September 7, 2017. In this regard, I refer to paras. 7, 15, 16, 17, 18, 19, 20, 23, and 27 and, in particular, Exhibit H of Mr. Banfield's affidavit. Mr. Banfield offers no explanation as to why the second proposed witness, Mr. Glencross was left off his witness list.

[11] I note that Mr. MacDonald on November 16, 2017, filed five subpoenas with the Court, one of which was for Mr. Glencross. There is not subpoena in the file for Ms. Smith. Today, Mr. MacDonald spoke to the reasons for now including Mr. Glencross.

[12] At para. 19 of Mr. Banfield's affidavit he deposed that at his discovery it was "made known to the Defendant" the issues surrounding Ms. Smith's involvement in the matter. Unfortunately, no discovery transcript excerpt is attached in support of this assertion. By contrast, in Mr. Murphy's affidavit at Exhibit A, a number of discovery pages are provided which give support to the position of the Respondent that the "government lady" or "someone from the government" was never identified by the Plaintiff as Ms. Smith.

[13] In the affidavit of Thomas Banfield sworn on November 28, 2017, the Plaintiff does not refer to Mr. Glencross. With respect to Ms. Smith, the Plaintiff stated that he was not aware of the individual referenced in his pleadings who conducted the training course for RKO. He also stated that he failed to notice that his counsel, Mr. Kevin MacDonald, did not add Ms. Smith as a witness on the Plaintiff's witness list. He further states that Ms. Smith has recently moved to Ottawa.

[14] On April 4, 2016, the Plaintiff filed a Request for Date Assignment Conference. He did not identify Mr. Glencross or Ms. Smith by name in the witness list or anywhere on the RDAC.

[15] At the Date Assignment Conference on June 17, 2016, Justice Warner directed the parties to file their witness lists with the Court on or before September 5, 2017. On September 7, 2017, the Plaintiff filed his witness list with the Court and provided the Defendant with a copy. His witness list included seven witnesses but not Mr. Glencross or Ms. Smith.

[16] I have considered the affidavit evidence and argument in the context of Rule 4.18 and the authorities. In particular, I have considered the explanations for omitting Ms. Smith and Mr. Glencross, having regard to the factors outlined by Justice Wood in *Saturley v. CIBC World Markets*, 2012 NSSC 155 and 2012 NSSC 325. In my view, the explanations offered by the Plaintiff are lacking. Indeed, I am of the view that no injustice will result by leaving the witnesses as originally set out in the Plaintiff's witness list. In this regard, neither Ms. Smith or Mr. Glencross were identified before the September 5, 2017 Finish Date or in the witness list filed by the Plaintiff on September 7, 2017. There has been no evidence put forward as to what evidence the Plaintiff expects Mr. Glencross will provide. As for Ms. Smith, I find Mr. Banfield's affidavit evidence about her anticipated evidence to be vague and not supported by transcripts or the like. It is simply not enough to boldly asset through counsel that the Defendant should have been able to identify Ms. Smith as a witness even though she was not on the Plaintiff's list.

[17] In the result it is my determination that the evidence marshaled on this application does not satisfy any of the factors listed in *Saturley* as important considerations. In particular, the Plaintiff has failed to establish grounds for the late inclusion of Mr. Glencross and Ms. Smith on his witness list to avoid an injustice in keeping with Rule 4.16. In the result, I dismiss this aspect of the Motion.

Issue Two – The admissibility of the *viva voce* and/or written evidence of Dr. Aiden Carey

[18] I now turn to the second part of the requested Order. The Plaintiff seeks, "direction from the court as to the admissibility in part or the entirety of Dr. Carey and other medical records related to the Plaintiff".

[19] The Plaintiff included Dr. Aiden Carey, his G.P., on his witness list but did not file any expert opinion or narrative report from Dr. Carey. Dr. Carey is only mentioned in para. 11 of Mr. Banfield's affidavit as follows:

> Exhibit "C' to this, my Affidavit, is a true copy of the Date Assignment Conference Memorandum issued by the Court, confirming that the parties wished a Settlement Conference and that neither party had objection to the admissibility of any of the documents and that there was no objection to the use of Dr. Carey's file or narrative report from him.

[20] I find para. 11 of Mr. Banfield's affidavit lacking for the reasons acknowledged by Mr. MacDonald during his oral submissions. Even if I accept the "drafting error" as a slip, the Date Assignment Conference Memorandum does not say what Mr. MacDonald has represented it says and there are no emails pointing to this version; i.e., that there was "no objection to the admissibility of any documents and that there was no objection to the use of Dr. Carey's file or narrative report from him".

[21] In the standard Date Assignment Conference Memorandum dated June 17, 2016, completed by Justice Warner and faxed to the parties there is reference to #5 expert witnesses (CPR 55). Justice Warner's notation beside this is "No x 2" which I take to mean neither party will be relying on a Rule 55 expert. By #5(c) is the question "any treating physician's narratives" (CPR 55.14) and this is left blank. Further on by #13(a) it is noted that the Plaintiff will be calling "zero" experts.

[22] In an effort to "pin down" the above, we have Mr. Graham's letter to the Court dated June 27, 2016, which reads as follows:

> I am writing with reference to the Date Assignment Conference Memorandum in relation to this matter which is dated June 17, 2016.
>
> I have a few very brief comments concerning the Memorandum. They are as follows:
>
> 1. In relation to question 5(a)(i), I understood that the Plaintiff was not intending to call any expert witnesses.
>
> 2. In relation to question 5(a)(ii), I indicated on behalf of my client that I also did not intend to call expert witnesses.
>
> 3. In relation to question 5(c), both parties indicated that they would not be relying on treating physicians narratives.
>
> I do not have any other comments in respect to the Memorandum.

[23] By way of response the file discloses the Judicial Assistant of the Supreme Court to Justice Warner, responding on June 28, 2016, with an email which reads in part:

> Justice Warner has asked me to contact counsel and advise that he has received your letter dated June 27, 2016, regarding the above noted file's Date Assignment Conference and is in agreement with your comments.

[24] Over a year passed until Mr. MacDonald filed his client's witness list on September 7, 2017 with Dr. Carey's name appearing as the last witness. The question now arises as to whether Dr. Carey should be permitted to be a trial witness and, if so, to what extent can he testify and how might his evidence be treated.

[25] Dr. Carey is a treating physician. Rule 55.14(5) reads as follows:

> A party who calls a treating physician at a 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.
>
> [Emphasis added]

[26] Having regard to the above, Mr. Banfield, a party who calls a treating physician (Dr. Carey) may not advance evidence from the physician (Dr. Carey) about a fact, finding or treatment not summarized in a narrative or covered in an expert's report.

[27] Once again, the Plaintiff never filed an expert or narrative report from Dr. Carey. Indeed, the material received yesterday from Plaintiff's counsel under cover "Joint Book of Exhibits", does not in any way qualify as a narrative or expert report.

[28] In terms of the caselaw, I am mindful of the Supreme Court of Canada authority cited by the Defendant at paras. 20 and 21 of their second brief, and in particular, *R. v. D.D.*, 200 SCC 43, a decision of Justice Major and *White Burgess Langille Inman v. Abbot and Haliburton Company*, 2015 SCC 23, a matter that originated in this honourable court with Justice Pickup's decision, went to our Court of Appeal and subsequently landed in the Supreme Court ending with Justice Cromwell's decision. At paras. 23 and 24 the Court stated:

> At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.
>
> At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.
>
> [Emphasis added]

[29] I note the import of my role as gatekeeper at the upcoming jury trial. I also refer to the cases touching on Nova Scotia Civil Procedure Rule 55, namely; *Russell v. Goswell*, 2013 NSSC 383, *Bruce v. Munroe*, 2016 NSSC 341, and *Haliday v.*

Cape Breton District Health Authority, 2017 NSSC 201. In addition, I refer to *Bezanson v. Sun Life Assurance Company of Canada*, 2015 NSSC 1.

[30] In my view, the Nova Scotia cases considering Rule 55 offer a narrow interpretation of what is permitted under the Rules. That is to say, collectively they stand for the proposition that Rule 55 must be strictly adhered to. For example, it has been held that under the narrative rule physiotherapy reports do not qualify as physician narratives. In the matter before me there has been anything but strict adherence. The remaining question is whether Dr. Carey might somehow be permitted to give limited evidence, perhaps as identified in *Bezanson*. In my view, Justice Boudreau's decision offers a very fine distinction between medical opinion provided for the truth of its contents and opinion admitted for the fact that it was given. In the circumstances of this case, I am of the view that it would be highly prejudicial and contrary to Rule 55 to permit Dr. Carey to give any evidence whatsoever. In this regard I am of the opinion that the evidence in question does not qualify under any statutory or common law exceptions to the rules regarding admissibility of expert opinion evidence. Even if it did, in the context of a jury trial, this would amount to providing expert opinion evidence through the "back door". Accordingly, if I permitted Dr. Carey to testify regarding his diagnosis or treatment of the Plaintiff, in addition to giving testimony of statements made by the Plaintiff about his condition, it would be highly prejudicial. No limiting instructions regarding acceptable use of such opinion evidence would be sufficient to avoid the severe prejudicial effect that would arise if Dr. Carey's opinions were effectively permitted into evidence through the back door.

[31] Perhaps the best example of this may be offered with reference to what Mr. MacDonald handed up today. In a letter addressed to Mr. MacDonald dated October17, 2013, Dr. Carey states as follows with respect to the Plaintiff:

> Thomas should not return to work at RKO Steel due to medical reasons. He should never return to that environment.

[32] In my view, this two sentence letter offers ample evidence as to why Dr. Carey should not be permitted to read his file into the record or read his notes, which clearly contain opinion. For the same reasons, I see no basis whatsoever for Dr. Carey's file to be included in the Exhibit Book.

Conclusion and Costs Determination

[33] We have Rules for a reason. The Rules governing experts have been carefully crafted and the Plaintiff has not complied with them. In particular, I again emphasis Rule 55.14(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 the narrative or covered in an expert's report". As I have said repeatedly, there are no narrative reports or expert's reports filed in this matter.

[34] I am mindful of the dangers in permitting Dr. Carey to give *viva voce* evidence in the context of a jury trial. There are other witnesses on Mr. Banfield's List who can speak to, if it is an issue, his integrity. Dr. Carey is an expert who knows Mr. Banfield though his professional association. He is clearly a physician and, in all of the circumstances, I find Rule 55.14(5) to be applicable.

[35] In the result, I decline to admit any documentary or viva voce evidence of Dr. Carey. Such evidence does not satisfy Rule 55 or any exceptions to the Rule and would otherwise be highly prejudicial even if admitted not for the truth of its contents.

[36] In terms of costs for today, I am awarding $3,000 in any event of the cause. I am not going to award it on a forthwith basis. This matter is going to be dispensed with one way or another, if there is a settlement today or Monday or failing that mid-trial or at some point the jury's verdict, later in December. That is when the $3,000 will be due and payable.

Chipman, J.