SUPREME COURT OF NOVA SCOTIA
Citation: *Jewell v. I-Flow*, 2017 NSSC 54

Date: 20170301
Docket: Tru No. 408788
Registry: Truro

Between:

Anne L. Jewell and Thurman M. Jewell,
Parents of Leia Bettina Jewell, on behalf of the
Estate of Leia Bettina Jewell, and
in their own right, pursuant to the
Fatal Injuries Act, RSNS 1989, c 163

Plaintiffs

v.

I-Flow, LLC, a body corporate,
Pictou County Health Authority, a body corporate, and
Dr. Maximillian Christian Lincoln

Defendants

Judge:	The Honourable Justice Gregory M. Warner
Heard:	February 16, 2017 in Halifax, Nova Scotia
Oral Decision:	February 16, 2017
Counsel:	Adam Crane, counsel for the plaintiffs Peter Rogers Q.C. and Katie Archibald, counsel for I-Flow LLC Carman McCormick and Daniel MacKenzie, counsel for Pictou County Health Authority Jack Townsend, counsel for Dr. Lincoln

By the Court:

[1] You deserve something more thorough, but I am going to give you an inarticulate oral decision that will include the reasons for my decision.

[2] This is an application by the plaintiff for an order compelling disclosure by the defendant of three categories of information outlined in paragraph 1(a), (b) and (c) of counsel's brief to the court on this motion. The requested disclosure relates to: complaints received by the defendant in relation to the On-Q Painbuster fixed flow pumps by I-Flow; complaints received by FDA and reported to I-Flow; and complaints received by Health Canada and reported to I-Flow, and I-Flow's files in respect of those complaints.

[3] The motion is made on the basis of a report prepared by Dr. Gentles, in which he tested the particular pain pump involved in this action. He noted in Part 8 of his report, as well as Appendix 3 and Appendix 4, that there seemed to have been recurring problems with the fixed flow model of the On-Q pump like the one in the patient in this case. He refers to 12 particular FDA incidents - his summary of how they were dealt with, as well as the report and the response of I-Flow.

[4] The inclusion of Part 8 in Dr. Gentles' report meets the definition, at this stage of this proceeding, of justification for finding that the request of the plaintiff is likely to lead to relevant evidence on the issue of liability.

[5] While the point made by counsel for I-Flow - that the real issue in this case is the condition of the flow pump used by the deceased, which pump was tested and found in order, is a valid point and it is an issue that the plaintiff must overcome when the ultimate liability decision is made in this case. Dr. Gentles' report does not foreclose, but in fact opens the door, to the relevance of an apparent recurring problem with fixed flow models of the On-Q pump like the one used by the deceased.

[6] The onus is on the plaintiff to show that the request for disclosure is relevant, and I am satisfied they have discharged it for the reasons that have been put by the court to counsel during their submissions.

[7] Mr. Rogers suggests that the request for disclosure is overly broad; it is not proportional. He relies upon the evidence of Mr. Aurin. The onus is for the defendant in this case to satisfy the court of any disproportionality or over broadness of the request.

[8] Paragraph 4 of Mr. Aurin's affidavit, stating that the defendant has manufactured in excess of 5 million pain pumps for world-wide distribution over an unknown period of time, provides the court with no sense of the scope of this disclosure request, which request is related only to fixed flow pumps. The affidavit of Mr. Aurin does not describe when the model of fixed flow rate pump came into use and manufacture by I-Flow, or whether it continues to be used. I have no data in front of me upon which I can temporally limit the request for relevant disclosure of the On-Q fixed flow rate pump.

[9] Paragraph 5 of Mr. Aurin's affidavit says the fixed flow pumps include three primary pump models with an array of different fill volumes, catheters and flow rates for a total of approximately 50 fixed flow pump products. That is concerning because the affidavit of Ms. Archibald, sworn June 5, 2016, filed for the purpose of limiting what is relevant, presumably pumps having the same characteristics as the pump used on Ms. Jewell, describes at Tab A, a single fixed rate pump model.

[10] So, somewhat on faith, I am prepared to accept that, at pages numbered 86 to 89 of Tab A of Ms. Archibald's affidavit, the court is being directed to the On-Q pump insert with fixed flow rate that is relevant, that covers the pain pump used by Ms. Jewel. On that representation, I am prepared to limit the request for disclosure 1(a), (b) and (c) to the On-Q pump insert with fixed flow rate referred to at pages 86 to 89 and to limit it as described on page 89 to the four combinations that include either labelled fill volumes of 270 millilitres and/or labelled flow rates of 5 millilitres per hour. This appears to include four combinations of pump and whatever accessories create a fill volume of 270 or a flow rate of 5 millilitres per hour.

[11] Temporally, only because the plaintiff asked, I limit the timeline from January 1, 2005, and while my inclination is to extend it to the present, to limit it to December 31, 2015.

[12] Obviously, if I had been provided information that showed that the model had changed at some point after March 1, 2011, I might have been inclined to temporally limit it to a shorter time frame. Absent any such evidence, I am not prepared to do so. The onus in this respect was on the defendant I-Flow.

[13] Part of the analysis of the exercise of discretion by the court under *CPR 4.12* was dealt with by the Court of Appeal in *Laushway v Messervey*, 2014 NSCA 7, at paragraph 86, where the court dealt with and categorized ten factors to be considered by a chambers or motion judge in accessing a request for disclosure. Both counsel have referred the court to this decision. It is in paragraph 32 of I-Flow's brief.

[14] With regards to Item 1, connection: what is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced? This claim is a claim for product liability in respect of an alleged defective pain pump. The request is for disclosure of complaints known to the defendant with respect to that type of pain pump. That may impact and, in my view, would likely lead to whether there are issues as described by Dr. Gentles with pain pumps of this model.

[15] With regards to proximity, how close is the connection between the sought information and the matters in dispute? It may be that some of the complaints to I-Flow or to FDA or to Health Canada are not admissible, are hearsay or may not have relevance or weight for various reasons, but that is not going to be known until there is the disclosure of the complaints and I-Flow's own files with respect to their investigation of the complaints.

[16] In terms of the third item, discoverability, only I-Flow, I am satisfied, can efficiently provide the requested disclosure.

[17] Fourth, with regards to liability, as Mr. Crane submitted, it may be that the complaints are not reliable. He assumes that I-Flow's file would not be advanced (claimed) by I-Flow to be unreliable.

[18] With regards to proportionality, I have tried to limit the request based upon the evidence before the court, advanced as an issue of proportionality by I-Flow, having already determined relevance. My decision is intended to meet that test based upon the evidence before the court.

[19] Number six, alternative measures. I am not aware of any less intrusive means available to the applicant to obtain the sought-after information.

[20] With regards to item seven, privacy. That was dealt with in a very general sense by the defendant in its brief. The court is not aware of any legislative scheme, none has been put before the court, that would restrict or limit the disclosure of information provided to I-Flow or to FDA or to Health Canada in respect of any other incident and what safeguards are available or are not available. For that reason, the court is unable to access any potential privacy issue at the time of the making of this Order, absent any representation or disclosure to the court as to what safeguards exist or are appropriate.

[21] The court's general knowledge of safeguards for hospital records is not relevant to this analysis. It is safeguards of information in complaints made to a public regulatory body. I am unable to assess that one way or the other or give it weight, absent any submission or legislation or evidence dealing with the potential impact upon the personal privacy issues of third parties.

[22] Number eight, balancing the privacy rights of individuals, public interest and the search for the truth. Obviously, subject to any public interest immunity or privilege issue, civil litigation is based primarily upon a search for the truth. The balancing in this particular matter is not in respect of relevance, it is the request for disclosure for information about third-parties and their experience with the pain pumps of the defendant that might or might not be relevant to the plaintiff's claim of a defective product.

[23] Number nine, objectivity. It is not known in this case how the information requested by the plaintiff will be used. The information may assist the defendant. The plaintiff has represented to the court that it intends to have its own independent, expert analysis conducted. Presumably that will depend upon the results of the disclosure received from the defendant I-Flow.

[24] Number ten deals with the issue of the terms and conditions that ought to be contained in the production order. I have identified conditions and terms which I believe are just, speedy and inexpensive in the context of this proceeding.

[25] That is the decision of the court, I apologize if it is inarticulate.

[Oral Submissions from counsel regarding costs]

[26] The costs should not be tied to the outcome. It is a procedural motion that is not going to be affected by the ultimate winner or loser of the litigation if the matter, if common sense does not resolve it before hand. So, it will not be changed in any way.

[27] The issue is the claim is for $2,000. The issue, quite candidly, was not that complicated. I order $1,500 costs to be paid irrespective of the result of the case by the defendant to the plaintiff. The other parties were watching so they are not benefiting.

[Submissions, payable forthwith or not]

[28] I wrote a decision in a corporate oppression case, *Merks Poultry Farms v Wittenberg*, 2010 NSSC 395, saying litigation that appears to be long-winded and may go on for some time, costs should be payable at the time and not long after unless payable forthwith would interfere with the ability to get to trial. In other words, prevent a party from being able to carry on the litigation.

[29] I followed that practice in all of the decisions I have had since, including several of the Knowledge House ones, involving serious litigation, so I agree it will be payable forthwith.

[30] That is the practice, and I think it is changing in our court more and more. It did not use to be that way but, in long litigation, it should be that way.

Warner, J.