SUPREME COURT OF NOVA SCOTIA

Citation: *Healy v. Halifax (Regional Municipality)*, 2017 NSSC 82

Date: 2017-03-24
Docket: Halifax Nos. 328081, 328082, 328084, 328086, 328092, 328093, 328094, 328095, 328096, 328097, 328098, 328099, 328100, 328101, 328105, and 333639
Registry: Halifax

Between:

Robert Healy and Anna Healy, Robert F. Healy Insurance Agency Incorporated, Douglas Tamlyn and Deborah Tamlyn, Tamlyn Construction Limited and Aspen Resources Limited, Donald Saunderson and Eileen Saunderson, Martin Wexler and Cheryl Wexler, Herman Hugenholtz and Beverley Ruth Hugenholtz, Peter Hall, Richard Bendor-Samuel and Stephanie Ouderkirk, Brian Perry and Kelly Skelhorn, Lindsay Hugenholtz, Eric Slone and Catherine Slone, Beverley Sweetman, James Spurr and Valerie Spurr, Robert Daniel Selkirk and Sonja McVeigh, Lara Ryan and Brett Ryan

Plaintiffs/Applicants

v.

Halifax Regional Municipality and Halifax Regional Fire and Emergency Service and The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendants/Respondents

Undertakings Decision

Judge: The Honourable Justice James L. Chipman

Heard: March 22 and 24, 2017, in Halifax, Nova Scotia

Counsel: Philip Chapman and Dillon Trider, for the Plaintiffs
Sandra Arab Clarke and Stewart Hayne, for the Defendants Halifax Regional Municipality and Halifax Regional Fire and Emergency Service
Michael T. Pugsley, Q.C. and Sheldon Choo, for the Defendant the Attorney General of Nova Scotia

Orally by the Court:

Introduction

[1] In *Healy v. Halifax (Regional Municipality)*, 2016 NSCA 47, Justice Bourgeois introduced the background to this case as follows:

> [1] In April 2009, a forest fire in the Spryfield/Ferguson's Cove area of the Halifax Regional Municipality resulted in significant property losses. A number of homes were completely destroyed and others which were spared destruction sustained varying degrees of damage.
>
> [2] A number of homeowners commenced legal action. In 16 separate actions, the plaintiffs … made identical allegations of negligence and gross negligence against the defendants Halifax Regional Municipality, the Halifax Regional Fire and Emergency Service and the Attorney General of Nova Scotia…

[2] Justice Pickup was the initial case management judge. With his retirement on September 30, 2016, I assumed the role of case management judge. In advance of the March 22 motion, I met with counsel for the parties on: October 31 and December 6, 2016, and January 18 and February 23, 2017.

[3] On March 3, 2017, the Plaintiffs filed a Notice of Motion requiring the Defendants Halifax Regional Municipality and Halifax Regional Fire and Emergency Service ("Halifax") to, "… complete all outstanding undertakings and comply with all denied requests arising during discovery examinations." The moving parties relied on *Civil Procedure Rules* 18.13, 18.16(6), 18.17 and 18.18. The Plaintiffs also relied on an affidavit of their counsel, Philip Chapman, sworn March 3, together with a brief and book of authorities.

[4] In resisting the application, Halifax filed on March 10 a brief, book of authorities and affidavit of their counsel, Sandra Arab Clarke, sworn March 9, 2017.

[5] In a letter filed with the Court on March 10, the third Defendant, The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia ("AGNS") advised they took no position regarding this motion.

[6] On March 14, the Plaintiffs filed a rebuttal brief and an authority, an excerpt from Lederman's *The Law of Evidence in Canada*, 4th Edition.

[7] On March 17, Halifax filed a supplemental affidavit of Ms. Arab Clarke, sworn on that date.

[8] On March 22, with the Defendants' consent, the Plaintiffs filed an affidavit of their other counsel, Dillon Trider, attaching the transcript of a July 4, 2012 hearing before Justice Murphy.

[9] This litigation has a long history which, not surprisingly, includes a host of discovery examinations. Over the course of 25 days, the Plaintiffs discovered 15 Halifax witnesses. During the discoveries, 256 requests were made of the 15 witnesses. The bulk of the 256 requests – 219 in total – were made of five witnesses:

1. Brian Gray – Halifax's designated manager (for purposes of discovery);

2. Bryson Wilson – Platoon Chief and incident commander at the time of the fire;

3. Danny Bracket – Captain of the Spryfield station and first incident commander on April 30, 2009;

4. Dawn Clancey –gave discovery evidence with respect to Halifax's (HRFES) dispatch practices; and

5. David Meldrum – Halifax's (HRFES) training officer.

[10] In Mr. Chapman's affidavit, he deposes that as of March 3, there are 23 incomplete undertakings and eight refused undertakings. In response, Ms. Arab Clarke asserts that a number of these alleged 31 outstanding requests or undertakings have been dealt with. Having reviewed the affidavits of both counsel, I find that Appendix "A" attached to Ms. Arab Clarke's brief is an accurate summary of the status of the undertakings/requests in issue. Indeed, in Mr. Chapman's latest brief, he adopts the same system of categorizing the requests/undertakings. For purposes of this oral decision, rather than now repeating each of the 31 items along with the positions of the parties, I adopt Appendix "A"

and add a further (fourth) column which repeats the reasons listed in Mr. Chapman's rebuttal brief at pp. 5-8.

[11] Before addressing and deciding each of the issues, I wish to briefly refer to the law.

Law

[12] Relevance is the primary consideration in addressing whether or not requests made at a discovery must be answered. Both the Applicants and Respondents have set out the test for relevance by referring to *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32. At paras. 11 and 12, Justice Bryson held that with the advent of the new *Civil Procedure Rules* there has been a narrowing of the relevancy test from what was a "semblance of relevancy" to a "trial relevancy" test. In *Brown*, a case involving personal injuries, the Court of Appeal held that disclosure may have been ordered under the old "semblance of relevancy test" but that the new Rule was "not so indulgent".

[13] In reviewing this matter, I have read all of the authorities advanced by the parties, inclusive of *Brown* and the more recent Supreme Court of Nova Scotia decisions in *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 57 and *Maple Trade Finance Inc. v. Euler Hermes American Credit Indemnity Co.*, 2015 NSSC 37. Further, I have focussed on the pleadings and affidavits and, in particular, the discovery exchanges appended to the three affidavits. I have reviewed the four Rules advanced by the Plaintiffs in their Notice of Motion; namely 18.13, 18.16(6), 18.17 and 18.18. In the result, I have applied a trial relevancy test and believe I am well-situated to do so, given that I am the case management judge and over the course of four meetings with counsel and my reading of the voluminous file I have acquainted myself with the matters in issue and what may be anticipated at trial.

Positions of the Parties

[14] The Plaintiffs submit that the requests and undertakings must be fully complied with on the basis of relevance. In their rebuttal submission, the Plaintiffs provide further argument, as noted in the above-referenced fourth column of reasons. Further, in response to Halifax's arguments regarding a number of the requests, the Applicants' view is that they are not attempting to obtain similar fact evidence. Rather, they emphasize para. 29 of the Statements of Claim, noting the

allegations of negligence/gross negligence arising from their assertion that there was no mop-up or fire watch conducted with respect to the fire.

[15] In their responding brief, Halifax provides their position on the various undertakings/requests in the third column. Additionally, they make a number of points, namely:

- that this motion represents the first communication from Plaintiffs' counsel with their position regarding the sufficiency of responses to the undertakings and requests;
- that the motion represents the first notification from Plaintiffs' counsel that certain discovery requests had not previously been addressed by the Defendants;
- that they have already provided answers to several of the requests; and
- that they have incurred "significant expense" as a result of being required to "again" identify for Plaintiffs' counsel responses to requests that they already provided and resubmit them to Plaintiffs' counsel to fully respond to the Motion.

Analysis and Disposition

[16] When I examine the 31 undertakings/requests, it becomes clear to me that 11 of the requests were already answered. With reference to Appendix "A", these requests are as follows:

D, E, G, H, O, R, S, U, V,W, X, and Y

Further, when I examine the answers, I find them to be responsive such that nothing further is required.

[17] Concerning undertaking/request H, based on Ms. Arab Clarke's representations at the hearing, Halifax will endeavor to provide the model numbers for the infrared scanners acquired in 2009, and this is a satisfactory result.

[18] With respect to EE, Appendix "A" (with the Plaintiffs' fourth column from their rebuttal brief added) reads as follows:

	Issue	Plaintiffs' Position	HRM/HRFES Response	Plaintiffs' Reasons
EE.	**Refused:** To identify any differences between the current training materials and training materials circa 2009.	The plaintiffs ask for the current wildland fire training materials to determine whether any adjustments were made to recommended practices after the Spryfield fire occurred. This goes to the question of whether HRFES, itself, identified that there were certain procedures that were either not followed or ought to have been in place at the time of the Spryfield fire. This issue was the subject of a recent email that I forwarded to Ms. Arab Clarke on February 27, 2017. The information is clearly relevant.	**This request has already been addressed.** On February 14, 2017, HRM/HRFES advised the Plaintiffs that Ms. Clancy advised that the training material that would have applied pre-2009 no longer exists. HRM/HRFES then advised and maintain that current training materials are irrelevant. As the earlier materials no longer exist, the differences in the content cannot be discerned and in any event, is not relevant.	The pre 2009 training materials have already been produced as part of this litigation. We therefore know what they are. This goes to the larger question of whether post 2009 training materials are relevant. They have been expressed to be irrelevant by counsel for HRFES. We feel that the current materials are relevant. If changes were made as a result of problems experienced in the Spryfield fire, the implication is that the original training material was inadequate. Inadequate training is one of the allegations of negligence.

[19] I agree with the Plaintiffs' position that the current materials are relevant. Indeed, I find this request calls for evidence which may well be admissible at trial. In this regard, I refer to *Driscoll v. Crombie Developments Ltd.*, 2006 NSSC 79. At paras. 20 and 21, Justice Wright had this to say:

> [20] I now turn to the evidence related to the further redesign and construction of the Level C exit gate which was carried out in January of 2006. The admissibility

> of that evidence was challenged by counsel for the defendant on the basis that it was irrelevant and that there are sound policy reasons for excluding evidence of post-accident changes made to the site of an accident. Counsel for the plaintiff wanted to introduce this evidence, not to serve as an admission of negligence on the part of the defendant, but rather to show the steps that could reasonably have been taken prior to the accident to discharge the required duty of care, having regard to the foreseeability of risk. In support of his position, plaintiff's counsel relied on the recent decision of this court in *Cheevers v. Halifax Regional Municipality* (2005) 234 N.S.R. (2d) 125 in which Justice Moir, after reviewing a number of legal authorities, ruled that evidence of post-accident measures is now admitted generally to prove negligence and is not restricted to proof of what could have been done in response to foreseeable risk (see para. 63).
>
> [21] My ruling was that while such evidence should not be treated as akin to an admission of negligence, nor should an inference of negligence be drawn from the mere fact that post-accident changes were made, the evidence should be admitted for the more specific purpose espoused by counsel for the plaintiff.

[20] Like the post-accident evidence mentioned above, training materials prepared after the fires in question will likely be relevant trial evidence and therefore should be compellable at the discovery stage. With respect to the pre-2009 training material there appears to be a difference of opinion as to whether it has been produced/exists. In any event, Halifax's answer need not identify any differences.

[21] Of the remaining 18 requests, Halifax has acknowledged that Z and BB, "were overlooked and will be answered". With respect to Z, I direct Halifax to ask Bill Mosher the specific question. As for BB, I am of the view that the statistical information Ms. Arab Clarke said (during the hearing) she is in the process of obtaining will be satisfactory.

[22] With respect to F, I am satisfied on the basis of the transcript that the AGNS agreed to answer the question. In any event, on the basis of the evidence before me, along with my application of the law, I have determined that F need not be answered as it calls for evidence that I consider irrelevant for trial. As for A, I am satisfied that Halifax's detailed answer and elaboration is satisfactory. Similarly, it is my determination that Halifax's response to AA has been effectively addressed through documentary disclosure.

[23] In the result, I will now focus on the 13 requests/undertakings which Halifax has refused to answer. Initially, the Respondents submitted that the following

requests, “bear no plausible connection to the matters in issue”:

B, T, CC, DD and FF

[24] These five requests/undertakings were summarized in Appendix “A” and a fourth column may be inserted (in three of the issues) from the Plaintiff’s rebuttal brief, revealing a table (followed by my decision for each) as follows:

	Issue	**Plaintiffs’ Position**	**HRM/HRFES Response**	**Plaintiffs’ Reasons**
B.	**Under Advisement:** To determine whether or not it is possible to determine the total number of employees that received basic wildland fire training. [Exhibit 3]	This request goes to the issue of the extent to which HRFES trained its personnel in responding to wildland fires.	**This request has already been addressed.** HRM/HRFES previously advised the Plaintiffs on October 30, 2015 that this request is not relevant. We have provided training records for those firefighters directly involved in the fire. The training of people not involved in the fire is not relevant.	All we are seeking to establish is the extent to which HRFES trained its fire fighting personnel on wildland fire issues. 29(1) of the Amended Statement of Claim alleges that there was a “failure to properly train HRM fire and emergency personnel on fire fighting techniques and procedures for wildland fires.” The comprehensiveness of the training program is directly relevant to the proceeding.

[25] I find the Halifax response to be satisfactory. In this regard, Halifax provided training records for the firefighters directly involved in the fire. I agree that the training of people not involved in the fire is not relevant.

	Issue	Plaintiffs' Position	HRM/HRFES Response	Plaintiffs' Reasons
T.	**Under Advisement:** With regard to page 7 of HF006061 (transcript of radio transmission for afternoon of April 30), to inquire of dispatch to determine whether they were simply asking 5 Quinte to cover for Station 6 or whether they were advising that 5 Quinte should be placed on standby in case they may be needed to respond as backup for Captain Brackett [Exhibit 14]	This request goes to the question of whether sufficient steps were taken to provide backup to the crew that initially responded to the fire on April 30.	**This request has already been addressed.** This question concerns a communication from Danny Bracket to Dave Wilson via dispatch. The transcript indicates at page 115 that Mr. Chapman was asking "what it is that dispatch was intending to convey there by indicating that 5 Quinte may be needed." The intent of dispatch is not relevant. On October 30, 2015, HRM/HRFES advised that the Discovery of Danny Brackett of Station 6, who made the request of dispatch, and Dave Wilson of5 Quinte, who received the request, had already been conducted. What dispatch understood the	It is maintained that the understanding of dispatch of the communication between Danny Bracket and David Wilson is not relevant to the issues in these proceedings. We say that it is relevant because one of the issues is why dispatch did not order backup earlier on April 30th or at least contact the acting Platoon Chief Brendan Dunfee.

			request to be is irrelevant.	

[26] I agree with Halifax that the intent of dispatch is not relevant. If one of the issues is, as the Plaintiffs argue, why dispatch did not order backup earlier on April 30 (or at least contact acting Platoon Chief Dunfee), it speaks for itself and the intent of dispatch is not required/relevant.

	Issue	**Plaintiffs' Position**	**HRM/HRFES Response**	**Plaintiffs' Reasons**
CC.	**Refused:** To provide the examinations for District Captain from 2004-2009.	None provided.	Refused. The standard of care is an objective standard. The question for the trier of fact is (a) what is the standard; and (b) did the actions meet the standard. The examination questions for Platoon Chiefs are not relevant to whether they did or did not meet the required standard.	None provided.

[27] Although the above Plaintiffs' reasons columns are blank, they had this to say at p. 4 of their brief:

> 8. We are not seeking to establish that the same or similar conduct took place in the other fires. To the contrary, most of the fires we ask about are fires where we know that extensive mop-up operations took place. All we are seeking to determine is three things:
>
> a) The extent to which HRFES and its individual fire fighters were experienced with mop-up;
>
> b) Why it was that mop-up operations were conducted for the other fires when none were conducted in this fire?; and

c) Other instances where HRFES and DNR had jointly conducted mop-up operations.

[28] I agree with Halifax's position that the standard of care is an objective standard. The question for the trial judge will be what is the standard of care and did the actions of the Fire Service meet the standard. Accordingly, the examinations are not relevant to whether Halifax's personnel did or did not meet the required standard. I would add that Halifax has already produced the job descriptions of the personnel in question.

	Issue	**Plaintiffs' Position**	**HRM/HRFES Response**	**Plaintiffs' Reasons**
DD.	**Refused:** To provide the last two examinations prior to 2009 for the Platoon Chief.	The reason for this request is that we maintain that Platoon Chief Bryson Wilson made a number of operational mistakes on the night of April 29 and the early morning of April 30. These include not conducting post-fire debriefing with personnel, terminating command prematurely, not ordering a complete mop up of the scene and providing incomplete information to the oncoming platoon chief the following day. We simply want to know whether the examinations for Platoon Chief prior to 2009 contained questions on	**Refused.** The standard of care is an objective standard. The question for the trier of fact is (a) what is the standard; and (b) did the actions meet the standard. The examination questions for Platoon Chiefs are not relevant to whether they did or did not meet the required standard.	We appreciate that the standard of care is an objective standard. But part of an assessment of breach also involves examining the knowledge base of the individual who is alleged to have been negligent. We are specifically interested in the Platoon Chief examinations because we allege that Bryson Wilson was negligent in the manner in which he dealt with the fire on April 29th and during the early morning hours of April 30th.

		operational issues that might be relevant to these allegations.		

[29] My decision is the same for DD as it is for CC.

	Issue	**Plaintiffs' Position**	**HRM/HRFES Response**	**Plaintiffs' Reasons**
FF.	**Refused:** To make inquiries what was taught with respect to that issue of cold trailing in the Wildland Fire Training course.	We are not entirely sure why counsel for HRFES has maintained that this was beyond the scope of the witness' discovery. Mr. Meldrum was the training officer of HRFES. The question was whether fire fighters were taught to "cold trail" in the wildland fire training course. Cold training is a process by where one sticks his hand into the soil/forest floor to feel for hear created by underground burning.	**Refused.** The question is improper. Mr. Meldrum was not present at particular training sessions. Further, HRM/HRFES has provided the training materials to the Plaintiffs and the Plaintiffs have asked multiple recipients of the training about the content of the training.	None provided.

[30] My decision is the same for FF as it is for CC and DD.

[31] Seven of the 13 requests in issue relate to the conduct of Halifax on other fires. With reference to Appendix "A", these are:

C, I, J, K, L, M and N

[32] Appendix "A" treats these undertakings/requests as follows:

	Issue	Plaintiffs' Position	HRM/HRFES Response
C.	**Under Advisement:** To determine whether or not it is possible to determine the total number of employees that received basic wildland fire training. [Exhibit 3]	This request goes to the issue of the extent to which HRFES trained its personnel in responding to wildland fires.	**This request has already been addressed.** HRM/HRFES previously advised the Plaintiffs on October 30, 2015 that this request is not relevant. We have provided training records for those firefighters directly involved in the fire. The training of people not involved in the fire is not relevant.
I.	**Under Advisement:** To determine who would be the best person to talk to with respect to the Kingswood Fire; and determine how many days the mop up was undertaken, the involvement of HRM in the mop up activities "and what type of mop-up was conducted i.e. was there digging, slashings. You know what the nature of the mop-up activities or if it was simply hosing down the perimeter then you can tell me that.". [Exhibit 8]	The main issue in this litigation relates to the plaintiffs' allegations that no mop up was conducted of the fire that occurred on April 29th. We suggest that such a mop-up should have taken place on the morning of April 30th. There is a dispute as to whether a mop-up was required. The plaintiffs wish to establish whether this fire was treated any differently than other major fires in terms of the extent of mop up. In other words, we wish to establish whether what was done in this instance was consistent with the practice HRFES adopted in other fires. It goes to the standard of care and compliance with procedure.	**This request has already been addressed/** On October 30, 2015, HRM/HFES advised the Plaintiffs that this request was irrelevant. Each fire would have had its own unqiru requirements for mop-up, depending on the circumstances of the fire. Without delving into each fire in the same degree of detail as has been carried out in this case, there is no reasonable basis for comparing the Defendants' conduct in those fires with the case at bar.
J.	**Under Advisement:** To determine what the 2011-2012 Spryfield Highway 103 fire was, and provide the same information as with the Kingswood fire, what took	Same as above.	Same as above.

	place after suppression of the fire itself, and the nature of the mop up. [Exhibit 9]		
K.	**Under Advisement:** To determine who would be the best person to talk to with respect to the 2008 Lake Echo fire, and determine how many days the mop up was undertaken, the involvement of HRM in the mop up activities and what type of mop up was conducted. "My understanding it was a fair size fire and that mop-up did take place at the time, so the same information on that fire" [Exhibit 10]	Same as above.	Same as above.
L.	**Under Advisement:** To determine who would be the best person to talk to with respect to the Lake Echo fire prior to 2008 (i.e. an earlier fire), and determine how many days the mop up was undertaken, the involvement of HRM in the mop up activities and what type of mop up was conducted. [Exhibit 10]	Same as above.	Same as above.
M.	**Under Advisement:** To inquire of Paul Hopkins, with respect to the Tantallon fire and determine how many days the mop up was undertaken, the Involvement of HRM in the mop up activities and what	Same as above.	Same as above.

	type of mop up was conducted. [Exhibit 10]		
N.	**Under Advisement:** To determine who would be the best person to talk to with respect to the Main Avenue fire, and determine how many days the mop up was undertaken, the involvement of HRM in the mop up activities and what type of mop up was conducted. [Exhibit 10]	Same as above.	Same as above.

[33] Rather than providing a rebuttal column for each of the above, the Plaintiffs emphasize para. 29 of the Statements of Claim and allege that there was negligence/gross negligence arising from their assertion that there was no mop-up or firewatch conducted with respect to the fire. The Plaintiffs go on to argue that they are not seeking to establish that the same or similar conduct took place in the other fires. On the contrary, they say that most of the fires they ask about are fires where they know that extensive mop-up operations took place. In the result, the Plaintiffs argue they are seeking to determine:

1. the extent to which Halifax and its individual firefighters were experienced with mop-ups;

2. why it was that mop-up operations were conducted for the other fires when none were conducted in this fire; and

3. other instances where Halifax and AGNS had jointly conducted mop-up operations.

[34] The Plaintiffs go on to argue there is no risk of a "trial within a trial" and, "all we are seeking to find out is what happened by way of mop-up in those other fires and why the decision was made to conduct those mop-up operations."

[35] With respect, I am of the view that these requests, if allowed, would lead to trials within the trial. In this regard, such an inquiry would lead to the parties and

the Court having to delve into such things as the particular circumstances in each fire, the nature of the fire, its size, fire behaviour on the dates in question, atmospheric conditions, the individuals who fought the fire, what information they had about the fire, communications from dispatch, as well as the equipment available. Indeed, based on my review of the affidavit evidence and pleadings, the Plaintiffs have failed to establish any connectedness between earlier events and the fire in question. Accordingly, I am of the view that the seven requests need not be answered. They are irrelevant and would lead to a potentially unmanageable trial. In this regard, I find the decision of *Wilson v. Lind*, [1985] O.J. No. 535 be of application. As Justice O'Brien concludes at p. 3:

> If such allegations were permitted in the statement of claim, the discovery process would be extensively prolonged and the trial would involve issues of prior and subsequent negligence and impairment. Rather than one trial there would be several.

[36] Request Q is reproduced in Appendix "A" as follows:

	Issue	**Plaintiffs' Position**	**HRM/HRFES Response**
Q.	**Refused:** To check with all Platoon Chiefs who were Platoon Chiefs back in 2009 to determine whether it was their practice to review FDM Reports from the prior shift, and if so, in what circumstances. [Exhibit 27]	The FDM report for the fire on April 29 contained commentary on experiencing hot spots and continuing fire attack until the crews exited the woods due to darkness. One of the allegations of the plaintiffs is that the oncoming crew of April 30 ought to have realized that the fire on April 29 had not been extinguished. We say that the FDM report suggested that it was not extinguished. The simple question is whether it was a practice of Platoon Chiefs to review the FDM reports. If that was a practice and it wasn't done on this instance, that goes to the standard of care to be expect of the Platoon Chief who worked on April 30.	**Refused:** Witness testified that there is no written standard or stated process requiring Platoon Chiefs to review FDM reports from the prior shift. This request is an attempt by counsel to take evidence from these individuals regarding the standard of care. **See Arab Clarke Affidavit, Exhibit "J", which includes further rationale provided by Mike Dunphy pages 113 to 118 of Brian Gray discovery.**

[37] In their rebuttal brief at para. 10, Plaintiffs' counsel states:

> We asked whether it was a practice of Platoon Chiefs to review FDM Reports from a prior shift and, if so, in what circumstances. We did not ask anyone to provide commentary on the standard of care of others. The narrow issue that is being addressed is whether the expectation, based on practice, was that Platoon Chiefs review FDM Reports from the previous shift. The oncoming crew did not review the FDM report from April 29th. If that was contrary to establish[ed] practice, that's a factor that goes to liability.

[38] In reviewing the transcript (Tab 27 of Mr. Chapman's affidavit), I agree with the Plaintiffs' position that their counsel did not ask anyone to provide commentary on the standard of care of others. During oral argument Mr. Chapman further submitted that since Halifax has advised they did not have a standard policy, memo or protocol regarding reviewing prior shift reports, he simply wishes to learn whether or not it is practice within HRFES for platoon chiefs in 2009 to review the prior shift reports.

[39] In opposing this request, Ms. Arab Clarke emphasizes *Crocker v. MacDonald*, 116 N.S.R. (2d) 181 (S.C.) a medical malpractice case wherein Justice Tidman set out the following issue:

> Although no specific question was framed, it is obvious from subsequent discussions of counsel following the start of the question that Mr. Wagner intended to ask Dr. MacDonald's opinion of the professional conduct of Dr. Myrden in carrying out the medical procedure in issue.

[40] In my view, Justice Tidman properly denied the intended question(s), reasoning as follows:

> In the case at bar Dr. MacDonald need not defend Dr. Myrden's actions, nor answer for his alleged failures. To require him or indeed to permit him to do so in these circumstances where both he and Dr. Myrden are defendants, would be unfair to both defendants and thus compromise the integrity of the trial process. I would therefore not permit questions to Dr. MacDonald asking for his opinion of the conduct of Dr. Myrden in his treatment of the plaintiff regardless of how those questions may be attempted to be disguised.

[41] With respect, I do not find the Plaintiffs request in this case to be analogous to the issue of one defendant doctor being asked to provide an opinion of another defendant doctor regarding the latter's conduct in treatment. Rather, Mr. Chapman's request comes after the Halifax witness deposed that there is no written

standard. Absent such a written standard, I regard the question as to whether other platoon chiefs reviewed shift reports as permissible. To my mind, this is a reasonable question that must be answered. It goes to the practice of whether or not the reports from the previous shift are reviewed. This could well be a reasonable line of inquiry at the trial. The question does not seek to have the deponent provide opinion evidence on the standard of care of others.

Conclusion

[42] In the result, I have ordered discovery undertakings/requests EE and Q must be answered by Halifax. Except for these two, along with H, Z and BB, all of the other requests/undertakings need not be answered. Barring the unforeseen, it would seem reasonable that the five outstanding requests/undertakings be provided on or before April 28, 2017.

[43] Costs in the amount of $2,000 shall be payable forthwith by the Plaintiffs to Halifax.

Chipman, J.