NOVA SCOTIA COURT OF APPEAL

Citation: *Intact Insurance Company v. Malloy*, 2020 NSCA 18

Date: 20200228
Docket: CA 488619
Registry: Halifax

Between:

Intact Insurance Company/Intact Compagnie D'Assurance

Appellant

v.

Shauna Vraielene Malloy

Respondent

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: November 22, 2019, in Halifax, Nova Scotia

Subject: **Production of Document. Relevancy Rule 14; Rule 15**

Summary: Ms. Malloy was injured in a motor vehicle accident in October 2014. She made a claim to the appellant, Intact Insurance Company, for coverage for a surgical procedure.

Intact refused to reimburse her for the cost of the surgery.

Ms. Malloy commenced an action against Intact alleging a failure to act in good faith. She sought production from Intact of its policies, procedures, guidelines, internal documents and other documentation outlining how accident claim benefits are handled and resolved at Intact.

Intact refused to disclose the documentation arguing they were not relevant within the meaning of Rule 14.01(1).

The matter was heard before Justice Jamie Campbell. He ordered Intact to produce the documentation.

Intact appealed arguing that the judge failed to properly apply

the test of relevancy and that Ms. Malloy had failed to prove the documents were relevant to her claim.

Issues: (1) Should leave to appeal be granted?
(2) Did the motions judge err in ordering Intact to produce the requested documentation?

Result: There was no evidence before the motions judge that the documents sought by Ms. Malloy were relevant to her claim. The motions judge erred in his application of the appropriate test to determine whether the documents ought to be produced.

Leave to appeal granted and the appeal allowed.

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v.

Shauna Vraielene Malloy

Respondent

Judges:	Beveridge, Oland and Farrar, JJ.A.
Appeal Heard:	November 22, 2019, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal allowed per reasons for judgment of Farrar, J.A.; Beveridge and Oland, JJ.A. concurring.
Counsel:	J. Scott Barnett and Ashley Dooley, for the appellant Ansley Simpson, for the respondent

Reasons for judgment:

[1] The respondent, Shauna Malloy, sustained injuries in a motor vehicle accident in October 2014. She applied for and received statutory no-fault accident benefits, commonly referred to as Section B benefits, from the appellant, Intact Insurance Company. Although it reimbursed her for some of her medical expenses, Intact denied her coverage for a surgical procedure.

[2] By Notice of Action dated December 6, 2017, Ms. Malloy sued Intact claiming that it improperly denied medical benefits under the Policy. In the Statement of Claim, Ms. Malloy alleged Intact had breached its duty of good faith:

> 8. Intact has an obligation to act in good faith and has breached that duty, the particulars of which include:
>
> (i) Intact failed to conduct reasonable assessments or investigations of Ms. Malloy's claim;
>
> (ii) Intact failed to conduct a fair and thorough adjudication of claims advanced by Ms. Malloy;
>
> (iii) Intact caused delays in Ms. Malloy's access to treatment;
>
> (iv) Intact caused delays in reimbursing Ms. Malloy for treatment causing financial stress;
>
> (v) Intact denied the reimbursement of certain medical and rehabilitative expenses to Ms. Malloy in an arbitrary manner without consideration of all medical evidence or a fair and equitable application of the Policy;
>
> (vi) Intact inappropriately allocated funds to the medical expense account of Ms. Malloy;
>
> (vii) Intact failed to respond to Ms. Malloy or her treatment providers in a reasonable time;
>
> (viii) Intact allowed a lay person(s) to interpret medical evidence while adjudicating the claim, Intact relied on the lay person(s) analysis of medical documentation and information in wrongfully denying the claim;
>
> (ix) Intact reached a decision to medical expense benefits to Ms. Malloy by conducting a biased investigation without equal consideration to the merits of Ms. Malloy's claim;
>
> (x) Intact ignored reports from Ms. Malloy's treating physicians, which demonstrated that Ms. Malloy required medical/rehabilitation expenses as defined by the Policy;

> (xi) Intact ignored reports from Ms. Malloy's treating physicians and independent medical examinations, which demonstrate that Ms. Malloy suffers from a substantial inability to perform the essential duties of her occupation or any occupation for which she is reasonably suited by education, training or experience, as defined by the Policy; and
>
> (xii) Such other breaches as may appear.

[3] During the course of the litigation, Ms. Malloy's counsel requested that Intact disclose its policies, procedures, guidelines, internal documents and other documentation outlining how accident benefit claims are handled and resolved at Intact. Intact objected to providing these documents as Ms. Malloy had not established relevance.

[4] Ms. Malloy filed a motion requiring Intact to produce the requested documentation. The motion was heard before Justice Jamie S. Campbell on April 18, 2019.

[5] The only evidence put forward by Ms. Malloy on the motion was the affidavit of Lisandra N. Hernandez, an articled clerk with the law firm representing Ms. Malloy. Ms. Hernandez's affidavit simply provides a chronology of the proceedings and the requests which were made for production of the documentation.

[6] Ms. Malloy did not provide an affidavit in support of the motion nor did she provide evidence at the hearing before the motions judge.

[7] In response to the motion, Intact filed the affidavit of Ashley MacDonald, an articled clerk with Intact. That affidavit includes portions of the discovery transcript of Ms. Malloy. At discovery she confirmed that all of the expenses which she had submitted to Intact had been paid with the exception of a claim for the surgery:

> Q. As I under – well let me back up a sec. Do you agree that all of the medical rehabilitation benefits that you've sought to have been paid have been paid with the exception of a breast surgery?
>
> A. I would need to think about that for a minute. I would agree that all of the medical claims that I have bothered to submit have been paid, with the exception of the breast surgery.
>
> Q. So, that is really – as far as that goes …
>
> A. Yeah.

> Q ….that is what the dispute is right now?
>
> A. Yeah.

[8] At discovery Ms. Malloy was also asked about the allegations in the Statement of Claim that Intact failed to act in good faith. In response to questions regarding the conduct of Intact, Ms. Malloy responded:

> Q. The next one, it says Intact failed to conduct a fair and thorough adjudication of claims advanced by you. Do you have any facts you can point to in connection with that allegation?
>
> A. Well would it be considered an adjudication of the claim when you judged that my breast reduction was not necessary? Because I would consider that not fair.

[9] That is the extent of the evidence of Ms. Malloy on the issue of lack of good faith as it related to the surgery.

[10] Although the discovery excerpts are short, they establish two things:

1. The only matter in issue at the time of the discovery examination was the failure of Intact to pay for the surgery; and
2. The only basis for the allegation of lack of good faith was Ms. Malloy thought the refusal was unfair.

[11] After hearing argument from the parties, the motions judge granted the relief sought and ordered:

> Intact Insurance to produce all Intact policies, procedures, guidelines, internal documents or other documentation (electronic or otherwise) outlining how accident benefit claims were handled or resolved during the adjudication of the plaintiff's claim.

[12] The motions judge also awarded $500.00 in costs to Ms. Malloy in any event of the cause (Decision reported 2019 NSSC 131).

[13] Intact seeks leave to appeal and, if granted, appeals the decision of the motions judge.

[14] For the reasons that follow, I would grant leave to appeal and allow the appeal. I would reverse the costs award on the motion and award costs of the motion of $500.00 to Intact. I would also award costs on the appeal of $1,500.00, all inclusive, to Intact. Both costs awards are payable in any event of the cause.

Issues

[15] I would summarize the issues as follows:

1. Should leave to appeal be granted;
2. Did the motions judge err in ordering Intact to produce the requested documentation?

[16] Ms. Malloy acknowledges that the appeal raises arguable issues. Considering that I would allow the appeal, that is an appropriate concession. Leave to appeal is granted.

Standard of Review

[17] The standard of review was explained by Saunders, J.A. in *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89:

> [38] The second function performed by the motions judge will be to identify the relevant factors or criteria which ought to be considered when applying the legal test to the evidence adduced. In order to identify the appropriate criteria the judge will look to the jurisprudence, statutes, rules or other basis of authority in order to identify the list of factors which ought to be taken into account. The judge will also consider the cause of action, the pleadings, and the factual and legal matrix between the parties. This examination will entail a consideration of matters that raise questions of both fact and law, but with a decided legal primacy, to be tested on a correctness standard. …

[18] Whether documents are relevant is not a discretionary decision. It is a determination based upon an application of legal principles to the facts determined from the evidence (*Sable Offshore Energy Inc. v. Ameron International Corp.*, 2015 NSCA 8 at para. 43). As such, the motions judge's decision will be viewed through the lens of correctness.

Analysis

[19] Although the Statement of Claim contained detailed particulars of the bad faith claim, it does not specifically allege that Intact failed to comply with its internal policy. More importantly, Ms. Malloy's counsel was unable to point to anything in the record that substantiates non-compliance or shows that such policies even exist. The discovery evidence of Ms. Malloy provides absolutely no evidence of any lack of good faith on the part of Intact.

[20] As an aside, it appears to me that this whole issue could have been avoided by simply discovering the Section B adjuster (which had been scheduled and adjourned) and asking a few questions about whether the policies exist, whether the adjuster had resort to any policies, whether the policies even address the issue that the adjuster had to decide, or any other matter that would be relevant to the determination of the conduct of Intact in this case. Why the parties proceeded in this manner, with the expense and delay associated with it, is unexplained.

[21] The starting point for disclosure of documents is *Civil Procedure Rule* 15.02 which puts a positive duty on a party to search for and to disclose relevant documents:

> **Duty to make disclosure of documents**
>
> **15.02(1)** A party to a defended action or a contested application must do each of the following:
>
> (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
>
> (b) search for relevant documents the party actually possesses, sort the documents and either disclose them or claim a document is privileged;
>
> (c) acquire and disclose relevant documents the party controls but does not actually possess.

[22] *Rule* 15.03 requires that a party prepare and deliver an "Affidavit Disclosing Documents". The Affidavit must be sworn or affirmed by an individual or an officer or employee of a corporate party (15.03(2)). This differs from the requirement under the previous *Rules* to file a List of Documents. There was no requirement to file an Affidavit attesting to what was done in determining what documents should be disclosed. Under the present *Rules*, a party must swear or affirm that it has:

- Thoroughly searched for, or supervised a search for relevant documents that are actually possessed by the party (15.03(3)(b)).
- Become informed about relevant documents in the control of, but not actually possessed by the party and has acquired the documents (15.03(3)(c)).
- To the best of the party's knowledge, never had control of relevant documents except as disclosed in the affidavit (15.03(3)(i)).

[23] In addition to the affidavit, there must be a certificate attached to the affidavit, if the party is represented by counsel, stating that counsel has advised the

party of their duty to search for, make diligent efforts to become informed about, acquire, sort and disclose relevant documents and electronic information, and of the kinds of documents and electronic information that may be relevant in the proceeding (15.03(4)(a)).

[24] The purpose of *Rule* 15 is evident on its face. It places an onerous duty on a party to a proceeding to seek out and produce relevant documentation and to swear an affidavit confirming they have done so. There are obvious potential costs and other sanctions that may flow from the failure to comply with the Rule and the production of an affidavit saying that the duty imposed by the Rule has been fulfilled.

[25] Therefore, in light of the disclosure requirements, a party seeking additional documentation must establish that there are other relevant documents in the possession of the other party that have not been disclosed.

[26] The definition of the term "relevant" for the purposes of documentary disclosure is contained in *Rule* 14 and provides:

> **Meaning of "relevant" in Part 5**
>
> **14.01** (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
>
> …

[27] The 2009 *Civil Procedure Rules* fundamentally altered the approach to be taken when a question arises with respect to the disclosure of documents or the discovery of witnesses.

[28] The reforms to the *Civil Procedure Rules* (1972) began in 2002 with appointments by the judiciary, the provincial government and the Nova Scotia Barristers' Society of members to a "Rules Reform and Revision Project Steering Committee". The committee then set up a process for broad consultation between the Bench and Bar. This was explained by Justice Gerald R.P. Moir in *Saturley v. CIBC World Markets Inc*, 2011 NSSC 4 at ¶21.

[29] As Moir, J. in *Saturley* noted, one of the most serious problems identified with litigation is its cost, which impeded access to justice:

> [19] The most serious problem with modern civil justice is its cost. Those who recognized this, and advocate reform, could not ignore the cost of the *Peruvian Guano* test. Mr. Keith referred me to this passage from Lord Woolf's "Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales" (HMSO, London, 1995) at p. 167:
>
> > The result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.
>
> [Emphasis added]

[30] As a result of the committee's work, there was a sea change in the manner in which judges determined production of documents and discovery in Nova Scotia. "The semblance of relevancy" test was displaced with relevance as defined in *Rule* 14.01.

[31] Again, Justice Moir explained in *Saturley*:

> [24] Rule 14.01(1) is to be understood against that background of legislative history: gradual adoption of the nineteenth century "semblance of relevancy" test on the basis that it is too difficult for lawyers and judges to determine relevancy in the pre-trial stage; recognition that the test lead to wasteful expense and, thus, impeded justice, and; for Nova Scotia, the recommendation of a solution through a definition of "relevant" for the purposes of disclosure and discovery.

[32] The focus on the requirement of relevance, albeit in the discovery of experts, but equally applicable to document disclosure, was discussed by Saunders, J.A. in *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 as "an important historical and procedural shift". He explained:

> [69] Advocates for change now viewed liberal and far-ranging discovery as part of the problem, rather than part of the solution. In many cases the frequency of discovery – especially involving experts – was seen to be a waste of time and resources. The money spent on discovery, and the months taken to complete it, did not measure up on any cost-benefit analysis. While such sentiments were not universally held, the idea that the time had come for a substantial revision in the rules relating to discovery ultimately prevailed. Eventually, after a lengthy

> process of consultation, significant reform was achieved. Instead of permitting discovery of "any person" with potentially relevant evidence to give (however remote), new Rules were written which were clearly intended to limit, or foreclose, the availability of discovery, except as specifically authorized under the 2009 Rules. The interpretation and application of the present Rule 18 should be seen in the context of this important historical and procedural shift.

[33] It is against this backdrop that I must consider the motions judge's decision.

[34] The motions judge's decision relied solely on the specificity of the allegations of the failure to act in good faith that are contained in the Statement of Claim. His reasons are encapsulated in two paragraphs:

> [14] Ms. Malloy's Statement of Claim asserts that Intact has an obligation to act in good faith and has breached that duty. Paragraph 8 of the Statement of Claim sets out the particulars. It says that Intact failed to conduct reasonable assessments or investigations of Ms. Malloy's claims and failed to conduct a fair and thorough adjudication of those claims. The Statement of Claim says that Intact denied the claim "in an arbitrary manner without consideration of all medical evidence or a fair and equitable application of the Policy." It says that Intact allowed "a lay person(s) to interpret medical evidence while adjudicating the claim, Intact relied on the lay person(s) analysis of medical documentation and information in wrongly denying the claim." The Statement of Claim says that Intact "ignored reports from Ms. Malloy's treating physicians which demonstrated that Ms. Malloy required medical/rehabilitation expenses as defined by the Policy."
>
> [15] The claim by Ms. Malloy is neither "bald" nor "boiler-plate". It is not a simple allegation of bad faith.

[35] Although the pleadings are a factor to be taken into consideration in determining whether documents are relevant, they are not the only factor. If that were the case, adroit counsel could draft pleadings in such a manner to allow a party to embark on a fishing expedition. This is precisely what the *Rules* were intended to avoid when they were amended to move from the "semblance of relevance" test to relevancy. The motions judge's decision, in my view, reverts to the "semblance of relevance" test. Allegations, no matter how specifically worded or drafted, which have no basis in the facts or the evidence without more, cannot be the basis for a production application. This is particularly true here, where there was a dearth of evidence before the motions judge.

[36] In *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, this Court stressed the importance of supporting evidence in production motions under

the new *Rules*. Bryson, J.A. opened his analysis with a summary of the consequences of the Rule 14 amendments:

> [12] The *Rule* requires the Chambers judge to decide relevancy as if he or she were entertaining a request for evidence at trial. In *Murphy v. Lawton's Drug Stores Ltd*., 2010 NSSC 289, Justice LeBlanc discusses at some length the meaning of "relevant evidence". In *Murphy* and *Saturley*, Justices LeBlanc and Moir conclude that the "semblance of relevancy" test has been displaced. I agree. However, the consequence is that judges have to determine relevancy long before trial, without the forensic advantages of the trial judge. This is thought to be the price of reducing litigation cost. As Justice Moir observes in *Saturley*, we have to ask a Chambers judge to assume the vantage point of the trial judge, "imperfectly constructed though it may be" (*Saturley*, para. 45). It remains to be seen whether this effort to save resources will be frustrated by the time and expense of extensive evidence on such motions in order to reproduce "the vantage point of the trial judge." And of course any such ruling is not binding on the trial or application judge: *Rule* 14.01(2). In any event, I agree with Justice Moir's comments at para. 46 of *Saturley* that:
>
> > [46] This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
> >
> > - The semblance of relevancy test for disclosure and discovery has been abolished.
> > - The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.
> > - ·The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The Rule does not permit a watered-down version.
> > - ·Just as at trial, the determination is made on the *pleadings and evidence known to the judge* when the ruling is made.
>
> In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.

> [13] I also agree with Justice Moir that this does not mean a retreat from liberal disclosure of relevant information.
>
> [Emphasis added]

[37] Bryson, J.A. continued:

> [22] … Without extensive medical evidence, it is hard to say whether Ms. Brown's knee injuries were divisible or indivisible. Under the former *Rule,* a Chambers judge may well have erred on the side of disclosure, …
>
> [23] … The medical evidence before the Chambers judge in this matter was extremely limited. It falls far short of providing the court with sufficient information to decide whether the injuries to Ms. Brown's knee were indivisible within the meaning of *Athey*. Without evidence which could support that determination one cannot say whether settlement information from the 2004 accident was relevant. In ordering disclosure, the Chambers judge erred in law. Moreover, having determined that the settlement information was relevant, he was obliged to consider whether settlement privilege prevented its disclosure.
>
> [Emphasis added]

[38] Bryson, J.A. concluded the supporting evidence was insufficient to establish trial relevance.

[39] Evidence plays a central role in production motions under the 2009 *Rules*, as it is instrumental in "reproducing the vantage point of the trial judge". Similar to *Brown*, the evidence put forward on this motion does not establish that a policy relevant to the denial of Ms. Malloy's claim exists, let alone its relevancy to the issue of lack of good faith.

[40] In *3008361 Nova Scotia Ltd. v. Scotia Recycling Ltd.*, 2013 NSSC 256, a decision of Scaravelli, J., the defendant was in the business of sorting and baling recycled materials collected from households. The defendant operated out of leased premises in the plaintiff's building. The building was damaged by fire. The plaintiff brought an action, alleging that the fire was a result of the defendant's negligence. The defendant relocated. Two years later, a second fire occurred at the defendant's new location. The plaintiff brought a motion seeking production of all documents related to the second fire. The defendant contested the motion on the basis of relevance.

[41] The motions judge dismissed the motion finding that in order to be put in the position of a trial judge the request for relief must be supported by evidence lest it

constitute a fishing expedition. I agree with Scaravelli, J.'s finding that the request for production must be supported by evidence:

> [12] A motion Judge in these instances is put in the position of the trial Judge at trial. The request for relief must be supported by evidence, unlike *Halifax Dartmouth Bridge Commission v Walter Construction Corporation* [2009 NSSC 403] relied upon by the plaintiff, there is no evidence before me as to the manner of operation of the defendant's business in the second location that would establish relevance to the issues of negligence raised in the pleadings. No supplemental affidavits or further evidence have been provided following discoveries. The commonality of a fire in separate buildings two years apart does not, by itself justify disclosure of documents relating to the second fire.
>
> [13] To order disclosure of the documents at this stage of the proceedings without further evidence would only serve to sanction a fishing expedition, as stated by Justice LeBlanc in *Murphy vs. Lawtons Drugs Stores Limited*, 2010 NSSC 289.
>
> [Emphasis added]

[42] LeBlanc, J. in *Murphy v. Lawton's Drug Stores Ltd.*, 2010 NSSC 289, referred to by Scaravelli, J., reached a similar conclusion:

> [41] With reference to the post event records, i.e. records after June 20, 2006, I am of the view that without any evidence of a change in the manner in which the system was being maintained, requiring the defendant to produce those records would effectively sanction a "fishing expedition" to determine whether there was any such change. Without such evidence before me, the daily logs for these periods would not be relevant to any issue raised in the pleadings. There are no particulars of negligence alleged for any date after June 20, 2006.
>
> [Emphasis added]

[43] The evidentiary burden was on Ms. Malloy to establish that further disclosure was required, as well as the extent of that disclosure. She failed to do so. To grant her request for the breadth of the documentation sought would be to sanction a fishing expedition.

[44] While there might be documentation in the possession of Intact which may be relevant to the plaintiff's claim, on this record, Ms. Malloy has failed to establish the existence or relevance of such documentation.

[45] Finally, at some point a balance must be struck between document production and practicality. The production order, even if it could be upheld on the basis of relevance, is too broad. Every internal policy, procedure, guideline or

set of guidelines, documents or other documentation in the possession of Intact could not possibly be relevant to the very narrow claim asserted by Ms. Malloy. Such a production order defeats the very purpose of the *Rules* for the "just, speedy, and inexpensive determination of every proceeding" (*Rule* 1.01).

[46] Further, in the order it requires Intact to produce the documentation "outlining how accident benefits were handled or resolved during the adjudication of the Plaintiff's claim" is ambiguous and overly broad. It could, potentially, require Intact to produce all of the documentation relating to accident benefits claims which were handled or resolved during the time of the adjudication of the plaintiff's claim regardless of whether they bore any resemblance or commonality with Ms. Malloy's claim.

Conclusion

[47] I would grant leave to appeal, allow the appeal, set aside the decision of the motions judge, and to the extent that Intact has paid the costs award on the motion to Ms. Malloy, order those funds be returned to it. Intact will have costs of the motion below in the amount of $500.00 and costs of this appeal in the amount of $1,500.00. Both costs awards are payable in any event of the cause.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Oland, J.A.