SUPREME COURT OF NOVA SCOTIA
Citation: *Bruce v. Munroe*, 2016 NSSC 341

Date: 20161220
Docket: Hfx No. 410402
Registry: Halifax

Between:

Patricia Darlene Bruce

Plaintiff

v.

Andrew Douglas Munroe

Respondent

Judge:	The Honourable Justice Peter Rosinski
Heard:	December 9, 2016, in Halifax, Nova Scotia
Counsel:	Richard Bureau and Kate Preeyra, for the Plaintiff Christa Brothers, Q.C., and Karen Bennett-Clayton for the Defendant

By the Court:

Introduction

[1] Ms. Bruce was involved in a motor vehicle accident on December 29, 2011. Her trial against Mr. Monroe is scheduled between January 9 and 18, 2017. The plaintiff has given notice that she intends to rely on treating physicians', narratives of various medical doctors pursuant to Civil Procedure Rule [CPR] 55.14, and a purported rebuttal expert report of Dr. Roger McKelvey, dated January 29, 2016, pursuant to CPR 55.05. The defendant disputes the admissibility of these documents.

The treating physicians narratives in dispute

[2] Dr. Janice MacGregor:

a. January 31, 2012 referral to Dr. McKelvey:

> 51-year-old female had MVA on 29 December 2011. Since that time she has been significantly impaired in her concentration, finding words, blurred vision, etc. She also notes that she leans to the right and loses her balance. This is impairing her ability to work. She did not hit her head [that she knows of]. No neurological deficits on physical chart. Please assess.

b. April 5, 2012 referral to EENT Associates:

> 50-year-old female was involved in MVC on January 6, 2012. Has been experiencing vertigo, ataxia, mild aphasia. She saw Dr. McKelvey who feels she has vertigo. Please see and assess.

c. June 7, 2012 referral to Dr. B. Joyce, Physical and Rehabilitation Medicine:

> 51-year-old female had an MVC on 29 Dec 2011. Since then she has had significant impairment. She has been consistently off balance – stumbling to her right with dizziness. Of more concern is her inability to focus and process information/data. She has a job that requires her working with spreadsheets and finance and she cannot with confidence focus and do her job. She has attended the Atlantic Balance Centre with a provisional diagnosis of positional vertigo but Mr. MacNeil (PT) has found signs that do not confirm this diagnosis. Whatever the diagnosis she is not improving. Please assess.

d. July 23, 2012 referral to Dr. C. Maxner, Neuro-Opthamology:

> 51-year-old female was involved in MVC on 29 Dec 2011 and since then she has had significant impairment of balance and concentration and has been found to have Vertical Nystagmus. I had hoped her symptoms would have resolved by now but she is not improving. Are there agents to help? In my research I found Ampyra (4 aminopyridine) but the side effects may be significant. Please review this patient. How can we help her?

(i) The defendant's position

[3] The defendant accepts that Dr. MacGregor has been Ms. Bruce's long-standing family doctor. However, he argues that these succinct "referrals" are not proper treating physicians' narratives.

[4] The defendant relies primarily on the wording contained in CPR 55, as interpreted in decisions from this court: *Russell v. Goswell*, 2013 NSSC 383, per Duncan J.; *Shaw v. JD Irving Limited*, 2011 NSSC 487, per Scaravelli J.; and *Bezanson v. Sun Life Assurance Co. of Canada*, 2015 NSSC 1, per D. Boudreau J.

[5] The comments of Justice Boudreau, though not in relation to treating physicians' narratives, and based largely on the common-law principles surrounding exceptions to the hearsay rule, are instructive :

> **19** The distinction between fact and opinion in medical records was addressed in the very recent case of *Gaudet v. Grewal*, 2014 ONSC 3542. In that case, the Plaintiff sought to introduce the written opinion of a doctor who had died prior to trial.
>
> **20** The Court noted that a medical diagnosis is an "opinion", whereas data contained in doctors' notes and records is merely factual information. Therefore, the factual information contained in the document was admissible pursuant to the principled exception to the hearsay rule (and would also have been admissible as a business record under the *Ontario Evidence Act*). However, the diagnosis and opinions of the doctor were not admissible as business records.
>
> …
>
> **28** In other words, there is a clear distinction between the subjective observations admitted in *Ares v. Venner*, and opinions that are of a scientific or technical nature (see also: *Greenwood v. Syncrude Canada Ltd.* (1998), 235 A.R. 141; *Spectra Architectural Group Ltd. v. St. Michael's Extended Care Centre Society*, [2001] A.J. No. 1417).
>
> **29** The case of *Seaman v. Crook*, 2003 BCSC 464 provides a good resume:
>
> [14] The cases...and s. 42(2) which provides: "In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if...", when taken together, stand for the following:
>
> (1) That the observations by the doctor are facts and admissible as such without further proof thereof;
>
> (2) That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof;
>
> (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth;
>
> (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth;
>
> (5) That the diagnoses made by a person to whom the doctor has referred the patient are admissible for the fact that they were made but not for their truth;

> (6) That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the clinical records as this is a judge alone trial.
>
> [15] Therefore any, and I emphasize the word "any", opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.
>
> **30** I accept and adopt the clear statement of the law on this issue as can be found in the cases of *Tingley, Seaman, Egli*, and others. Where a person with specialized knowledge in an area, having reviewed and analysed information, has arrived at his/her own subjective conclusion, and gives an opinion, such opinion is subject to special rules of evidence. It cannot be introduced to a court for its truth, without respect for those rules.
>
> **31** *Ares v. Venner* continues to stand for the proposition, in my view, that some simple observational opinions might be permitted to stand in business records. It should be noted that even lay persons are often permitted to opine in areas of common human experience (such as a person's temperature ("warm to touch"), color ("flushed"), mood ("angry"), and so on). But a true opinion, given by a person within their area of special expertise, is not and could never be a business record. In particular, where the medical opinions are crucial and of utmost importance to the case, as they would be here, the Court needs to be assured of their reliability. Such opinions must be brought forward to the Court by their authors, defended, and properly tested by cross-examination.
>
> **32** I should note that the Defendant's exhibits also contain, within them, some medical opinion from persons who did not testify. They are subject to the same rules.
>
> **33** To conclude: Any medical record, tendered by either party in this case, is admitted as a business records insofar as the factual information provided therein, or in respect of opinions that are merely observational in nature. Medical opinions, given by medical professionals within their area of expertise, are admitted only for the fact that the opinions were given. They are not admitted for their truth, unless the author of that opinion was called before the Court and properly qualified.

[6] Justice Boudreau's comments about the division between factual information and opinion evidence in the hearsay context, where medical records are presented at trial purportedly for the truth of their contents, inform how I should approach treating physicians' narratives, which contain both factual information and opinion evidence in this case.

[7] While it is anticipated in this case that the authors of the treating physicians' narratives will be available for cross-examination, so there is no immediate hearsay

concern, our courts have concluded nevertheless that treating physicians' narratives "must be strictly construed to avoid,… any circumvention of Rule 55.04 [content of expert's report]." – para. 24, in *Russell*.

[8] Rule 55.04 contains very formal and comprehensive requirements be met before a report of expert opinion evidence may properly be accepted by a court:

> 55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
>
> (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
>
> (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
>
> (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
>
> (d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;
>
> (e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.
>
> (2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:
>
> (a) details of the steps taken by the expert in formulating or confirming the opinion;
>
> (b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;
>
> (c) the degree of certainty with which the expert holds the opinion;

> (d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.
>
> (3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:
>
> (a) the expert's relevant qualifications, which may be provided in an attached resumé;
>
> (b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;
>
> (c) reference to all publications of the expert on the subject of the opinion;
>
> (d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;
>
> (e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

[9] The defendant goes so far as to say, directly or impliedly, that regarding proper treating physicians narratives:

> i-the content should be limited to the very day the narrative document relates to, and therefore the notations should be somewhat contemporaneously made, and only reflect the factual observations and findings of the doctor on that date; and (in a departure from the common law hearsay principles cited by Justice Boudreau in *Bezanson*, but allowed by our CPR 55.14 in part because they are personal observations of the physician who will be present for cross-examination at trial) any opinions should be limited to the provisional diagnosis which the doctor in question is qualified to make, and based only on their own factual observations and findings(which in contrast to the defendant's position I note here, are not in my opinion limited to the very day the narrative document relates to, but may have been made by the doctor in the past, provided they are precisely identifiable and still reasonably reliable observations and findings on that date);
>
> ii-if a party wishes to present opinion evidence that is not permitted by such strict construction of CPR 55.14, they are free to do so under the much stricter confines of CPR 55.04.

[10] At this point, it is opportune to recite CPR 55.14:

> Treating physician's narrative
>
> 55.14 (1) A party who wishes to present evidence from a physician who treats a party may, instead of filing an expert's report, deliver to each other party the physician's narrative, or initial and supplementary narratives, of the relevant facts observed, and the findings made, by the physician during treatment.
>
> (2) A narrative, or initial and supplementary narratives, must be delivered within the following times:
>
> (a) no more than thirty days after the day pleadings close in an action, if the treatment occurs before the action is started;
>
> (b) within a reasonable time after treatment is provided during the course of an action and no later than the finish date;
>
> (c) as directed by a judge in an application.
>
> (3) A party who receives a narrative, initial narrative, or supplementary narrative expressing a finding may, within a reasonable time, file a rebuttal report that conforms with Rule 55.05.
>
> (4) A party may not obtain a discovery subpoena for, deliver interrogatories to, deliver written questions to, or obtain an order for discovery of a treating physician who provides a narrative rather than an expert's report.
>
> (5) 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.
>
> (6) A judge who presides at the trial of an action, or the hearing of an application, or who makes a determination under Rule 55.15 must exclude expert opinion evidence of a treating physician who provides a narrative instead of an expert's report, unless the party offering the evidence satisfies the judge that the other party received information about the opinion, and about the material facts upon which it is based, sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician.

[11] It must be recalled, that at trial, treating physicians' narratives stand essentially as the direct evidence of the physician. They are available for cross-

examination by the other party. However, the reality is that physicians' chart notes, and similar notations are made for use in medical circles, not for purposes of litigation. They are largely written in a manner that is very informal, brief, and intended to be private, and primarily for the purposes of the treating physician. Understandably, physicians attempt to be efficient in the use of their time, particularly in relation to taking any unnecessarily long time to complete notations of their observations and findings, and provisional diagnoses regarding their patients.

[12] CPR 55.14 was intended to be a compromise between unduly requiring treating physicians to attend at trials and comply with the formalities regarding the preparation and filing of expert opinion reports, yet still having the benefit of their findings, observations, and to some extent expert opinion evidence available by virtue of making admissible narratives that properly conform to CPR 55.14 as treating physicians narratives. Thus, apart from their testimonial confirmation of the content in the treating physician's narrative, they need only be present for cross-examination thereon (CPR 55.14(5)).

(ii) The plaintiff's position

[13] In response, Ms. Bruce argues that it is important to interpret CPR 55.14 in a generous manner, in order to allow a party the benefit of their treating physician's fulsome observations and findings, and possibly opinions, related to the patient's conditions.

[14] She argues that treating physicians do not intend to create medical legal reports when they create their chart notes, etc. Over time, their chart notes "paint a picture" of their findings and observations of a patient's progress, or not, and given their strong familiarity with the patient, their opinions regarding provisional diagnoses should be permitted as "treating physicians narratives" because they will be available for cross-examination in any event at trial, and the court will, if appropriate, put little or no weight on those opinions which stray beyond their expertise, or are undermined by the evidence before the court.

[15] Ms. Bruce also points out that the court should consider the "referrals" herein as properly being treating physician's narratives and should look at them as a whole and not parse through them, looking for individual words or the odd sentence which might not reflect perfect compliance with CPR 55.14. She argues that courts should only make truly necessary (i.e. meaningful or significant) redactions to disputed treating physician's narratives, given the opportunity for cross-examination of the author at trial.

(iii) Conclusion regarding the proper interpretation of the Rule governing treating physicians' narratives

[16] To my mind, the defendant's position regarding the proper interpretation of CPR 55.14 is generally persuasive. The defendant's objections centre primarily on what could be considered the purported expert opinion evidence contained within the treating physicians' narratives in dispute. The defendant does not vigorously attack factual observations and findings made by the doctors. I note that CPR 55.14(1) permits treating physicians narratives "instead of filing an expert's report"; and refers to "relevant facts observed, and the findings made". It does not refer to "opinion". Only in CPR 55.14(6) does the word "opinion" appear. I conclude that, "findings" and "opinion" were intended to reflect nuanced different meanings: "findings" include the results of testing of the patient done during treatment as well as the opinions formed (inter alia – provisional diagnoses); whereas it is solely the expert "opinion" aspect which is to be rebutted by a formal CPR 55.05 expert report.

[17] CPR 55.14(6) states that a judge: "must exclude expert opinion evidence of a treating physician who provides a narrative instead of an expert's report, unless the party offering the evidence satisfies the judge that the other party received information about the opinion, and about the material facts upon which it is based,

sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician."

[18] Notably, the burden is upon the party proffering the expert opinion within the confines of the treating physician's narrative. Moreover, the content of the treating physician's narrative must be sufficient to allow the other party "to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician."

[19] This necessarily requires one to have reference to CPR 55.04 and CPR 55.05 to gain an understanding of whether the treating physician's narrative in question would clearly permit the opposing party "to determine whether to retain an expert to assess the opinion, and prepare adequately for cross-examination of the physician." Otherwise, the opposing party's proposed expert would be unable to properly fulfil its obligations under CPR 55.04 and CPR 55.05.

[20] Moreover, generally speaking, the hearsay restrictions identified by Justice Boudreau in *Bezanson* at para. 29 apply equally to treating physicians' narratives.

[21] Consequently, the expert opinion evidence suggested to be contained in a treating physician narrative must not be ambiguous, and must be based on the

treating physician being a properly qualified expert, having made his/her own factual observations and findings regarding the patient during treatment.

[22] In my opinion, it will likely be uncommon that these requirements for expert opinion evidence contained within a treating physician narrative will be met in many cases.

[23] I should point out, however, that I do not entirely agree with the defendant's position that the content should be limited to the very day to which the narrative document relates. The physician's *factual* observations and findings need not be limited to what was observed on the day to which the narrative document relates - in some cases they may necessarily be informed by factual observations and findings made by the doctor in the past, and therefore may be subsumed within the narrative of that date, provided they are still, reasonably identifiable (from within the narrative document in dispute), and remain reliable observations and findings on that date.

[24] More than necessary, dispute is generated in cases where one party is genuinely uncertain as to limits of, and the precise nature of the expert opinion, that the other party wishes to rely upon in proffering a treating physician narrative – this may arise from the ambiguous nature of the notations made by a treating

physician which are not intended for legal purposes, and which cannot be formally investigated by the opposing party, since no discovery of any kind, not even written questions, is permitted for a treating physician - CPR 55.14(5).

[25] It may be that a customary and voluntary provision of some level of detail by the party proffering the opinion within a treating physician narrative, would best reflect the spirit and purpose of our Civil Procedure Rules: "the just, speedy, and inexpensive determination of every proceeding."

[26] Such provision of notice to the opposing party should not entail substantial effort, and may be prudent for parties who wish to present expert opinion evidence rooted in treating physicians' narratives, by identifying in a timely manner the contours of the opinion evidence. This can be achieved, for example, by creating a separate document entitled "treating physician's narrative" (appended to the original chart notes, or other documentary source of the opinion). That document should be signed by the physician and include a concise statement of the expert's opinion (including relevant factual observations/findings) and the expert's relevant qualifications, which may be provided in an attached resume.

[27] Next, I will address the defendant's objections in this case.

Conclusions regarding the treating physician's narratives in dispute

[28] I keep in mind CPR 55.15. Subsection 1 reads:

> A judge may determine whether a narrative, initial narrative, or supplementary narrative contain sufficient information to permit a treating physician to testify to an opinion stated in the narrative without delivering an expert's report.

[29] Subsection 2 permits me to "give directions" on either of the following:

> a. The conditions that must be fulfilled before a party may advance evidence from a treating physician about a subject mentioned in the narrative;
>
> b. The redactions that must be made to the narrative before an opinion expressed in the narrative may be offered as evidence.

[30] Moreover, as suggested by Justice Duncan in *Russell*, regarding each purported treating physician's narrative, I will ask myself:

1. Does it set out relevant facts observed?

2. Does it set out findings made? and

3. Were the facts observed, and the findings arrived at, made during treatment?

a) ***January 31, 2012 referral to Dr. McKelvey***

[31] The referral outlines what I infer are the physician's observations since her treatment of the patient shortly after the time of the collision on December 29,

2011: "She has been significantly impaired in her concentration, finding words, blurred vision, etc.". Chart notes for the patient were made as recently as January 28, January 20, and January 6, 2012.

[32] That the patient "leans to the right and loses her balance" does not appear to be a personal observation of the physician. Whether the observed impairment "is impairing her ability to work", is not something that the physician personally observed; nor is it a finding that the physician could make.

[33] That there are "no neurological deficits on physical chart", is a finding made by the physician either personally or based on recorded testing of other qualified professionals.

[34] Nevertheless, there is no "finding" in the nature of an "expert opinion" that would qualify this as a treating physician's narrative. Therefore, that aspect of the "finding" is not admissible under CPR 55.14, though the factual observations are, if not hearsay.

b) April 5, 2012 referral to EENT Associates

[35] This referral is written one day after the April 4, 2012 chart notation, that the patient saw Dr. McKelvey – the physician did not make personal observations of the patient on that date, nor is there sufficient detail in the referral to permit the

inference that the physician has observed the patient “experiencing vertigo, ataxia, mild aphasia.”; or has conducted testing to confirm this.

[36] Even if such could be inferred, there is no “finding” in the nature of an “expert opinion” herein that would qualify this as a treating physician’s narrative. Therefore, that aspect of the “finding” is not admissible under CPR 55.14, though the factual observations are, if not hearsay.

c) June 7, 2012 referral to Dr. B Joyce, Physical and Rehabilitation Medicine

[37] The referral outlines what I infer are the physician’s observations since her treatment of the patient shortly after the time of collision on December 29, 2011, up to the date of her last chart notation June 7, 2012: “since then she has had significant impairment.”. Even if I could infer that “she has been consistently off-balance – stumbling to her right with dizziness” as observations made by the physician, there is no “finding” in the nature of an “expert opinion” herein that would qualify this as a treating physician’s narrative. Therefore, that aspect of the “finding” is not admissible under CPR 55.14., though the factual observations are, if not hearsay.

d) July 23, 2012 referral to Dr. C Maxner, Neuro-Opthamology

[38] The referral outlines what I infer are the physician's observations and findings, since her treatment of the patient shortly after the time of collision on December 29, 2011, up to the date of her last chart notation June 7, 2012: "since then she has had significant impairment of balance and concentration and has been found to have vertical nystagmus". There is no "finding" in the nature of an "expert opinion" that would qualify this as a treating physician's narrative. Therefore, that aspect of the "finding" is not admissible under CPR 55.14; though the factual observations are, if not hearsay.

Dr. Janice McGregor's chart notes

(a) April 3 2013:

> Personality changes
> ++ irritable
> upset, scared
> Notices significantly different person – is this 2010 MVC

[39] The chart note outlines what I infer may be the physician's observations in part, yet substantially if not entirely, dominated by reports from the patient.

[40] There is no "finding" in the nature of an "expert opinion", nor are these the physician's "observations" but rather self reporting by the patient. This chart note

does not qualify as a treating physician's narrative; therefore, it is not admissible under CPR 55.14.

Reports – Dr. Ian Dempsey and Dr. Anita Mountain

[41] The defendant's position regarding these collectively is that "each of these proposed narratives provide opinions on causation, prognosis, disability and symptoms presentation. Next to nothing in these reports speak to the 'relevant facts observed and findings made, by the physician during treatment'".

[42] "The plaintiff is of the position that the physician narratives of… Dr. Dempsey and Dr. Mountain are summaries of the relevant facts observed and findings arrived at during treatment of Ms. Bruce and are therefore admissible. In the alternative, as outlined above, if the reports are found to be beyond the scope of accepted content for a physician narrative as prescribed by Rule 55, then the plaintiff is of the position that she has been unfairly prejudiced by the defendant's abuse of process, and unreasonable delay, in responding to the plaintiff's November 19, 2015 inquiry with respect to said narratives and/or reports. That is, but for the defendant's delay in responding, the plaintiff could have made clarifications/redactions to the physician narratives in order to be in compliance with Rule 55.14. In addition, had the defendant made his objections known with

any reasonable time, the plaintiff could have "sought to obtain this evidence as proper expert opinion pursuant to the Rules", and resubmitted the reports, in advance of the finish date in compliance with the provisions of Rule 55.04."

Dr. Ian Dempsey [August 24, 2012; October 10, 2012]

(i) August 24, 2012 report (date seen August 7, 2012)

[43] As I understand it, Dr. Dempsey is an ENT (ears nose and throat) specialist. Ms. Bruce was referred "for further assessment for possible vestibular injury".

[44] Dr. Dempsey made observations and conducted testing during his examination. He concluded:

> Cerebellar testing showed a tendency to drift towards the right with step testing and with tandem gait. She also seemed to have some intentional tremor when she was doing finger nose tracking with her right arm.

[45] He gave an opinion indicating a probable diagnosis of multisensory disequilibrium, and commented:

> I think the reason this patient is recovering so slowly is that she most likely has a couple of different ongoing issues. Most likely her cervical spine reflexes are disrupted from the whiplash injury and she seems to have some visual tracking issues as well that might be making it difficult for her to turn her head quickly.

[46] On the premise (accepted by counsel), that Dr. Dempsey is a "treating physician" in contrast to a CPR 55.04 "expert", his observations, including findings (testing conclusions) are admissible.

[47] His opinion regarding a probable diagnosis is not admissible, as it would circumvent the expert opinion Rules.

(ii) October 10, 2012 report (date seen September 10, 2012)

[48] Dr. Dempsey made observations, including findings that: "her ENG study showed normal peripheral vestibular responses, however, there was evidence of poor ocular tracking which is a measure of ocular smooth pursuit and indicates some degree of central vestibular dysfunction, usually originating from the cerebellum."

[49] On the premise (accepted by counsel), that Dr. Dempsey is a "treating physician", in contrast to a CPR 55.04 "expert", these observations/findings are admissible.

[50] The remainder of his report is of a general narrative nature, and explains his understanding of her situation and view of possible diagnoses and further examinations/treatment. To the extent that he references a prognosis, or causation source for her conditions, those are inadmissible pursuant to CPR 55.14.

Dr. Anita Mountain [seen February 11, 2013 – report April 25, 2013; seen November 25, 2013 – report December 19, 2013]

[51] Dr. Mountain is a physiatrist, working with the Acquired Brain Injury Clinic at the Nova Scotia Rehabilitation Centre.

(i) February 11, 2013 visit date

[52] Her original dictation of this visit was lost. Dr. Mountain stated:

> Unfortunately, my recollection of my visit with Patricia is somewhat limited given the length of time since my visit; however, the details that follow are based both on some rough notes as well as review of the medical record… Unfortunately, details of my physical examination were not recorded on my rough notes. I do have the results of the Montréal Cognitive Assessment, which I performed, for which Patricia had a score of 21/30 with 1/5 recall, 1/5 executive function, and difficulty with abstraction.

[53] Dr. Mountain made observations that day. She had available to her some "rough notes", (but not in relation to her physical examination of Ms. Bruce) and the results of the Montréal Cognitive Assessment, which she conducted.

[54] On the premise (accepted by counsel) that Dr. Mountain is a "treating physician", the results/findings of the Montréal Cognitive Assessment, are admissible pursuant to CPR 55.14.

[55] The remainder of her report is of a general narrative nature, and explains her understanding of Ms. Bruce's situation and view of possible diagnoses further examinations/treatment. To the extent that she references a possible prognosis, or causation source for Ms. Bruce's conditions, (including specifically: "Patricia has

ongoing cognitive complaints stemming from a motor vehicle collision… It would seem that these complaints are multifactorial in nature, including possible contributions for medication and pain"), those are inadmissible pursuant to CPR 55.14.

(ii) November 25,2013 visit date

[56] Dr. Mountain did not make any observations of Ms. Bruce that day. Her letter merely recounts Ms. Bruce's provision of updated information to Dr. Mountain.

[57] Dr. Mountain did not make any findings in relation to Ms. Bruce that day.

[58] Her letter did contain the following statement:

> Patricia continues to be interested in looking for productive role in her life. It is unclear given her myriad of symptoms whether return to paid employment would be possible. I think the best way to figure this out is to [make] a referral through vocational counselling and neuropsychological testing. I am going to refer her to neuropsych testing through our centre; however, she is also going to revisit the issue of private of neuropsychological testing with her insurance company. I would be pleased to write any letter in support of this that she requires.

[59] Neither did Dr. Mountain state any opinion in the letter that would amount to "findings" regarding Ms. Bruce.

[60] Consequently, none of this letter is admissible as a treating physician's narrative pursuant to CPR 55.14.

[61] Having said that, I acknowledge that as shown at Exhibit "B" of Daniel MacKenzie's November 10, 2016 sworn affidavit, defendant's counsel stated in her letter of March 4, 2016 to then plaintiff's counsel, Robert Dickson, Q.C.:

> 5. Dr. Anita Mountain, Physiatrist
>
> We are prepared to consent to the admission of the November 25, 2013 Ambulatory Care Clinic letter as a physician narrative. The February 11, 2013 Ambulatory Care Clinic letter contains opinion and therefore is not a physician narrative.

[62] Nevertheless, I am tasked with deciding the admissibility of this document under CPR 55.14. Admissibility is the exclusive domain of the court, and because the document does not meet the requirements of CPR 55.14, it remains inadmissible.

The prejudice argument made by Ms. Bruce

[63] Ms. Bruce's counsel has alternatively argued that she has been unfairly prejudiced by the defendant's inactions and actions, which created unreasonable delay in his responding to her November 19, 2015, inquiry with respect to the narratives and/or proposed reports.

[64] The trial was initially scheduled for May 24 – June 2, 2016, with a finish date of March 1, 2016. The plaintiff requested, and was granted, an adjournment of the trial dates on May 12, 2016. The new trial dates were set for January 9 – 12 and 16 – 18, 2017, with a finish date of November 4, 2016.

[65] The affidavit evidence and court file record before me establishes that Robert Dickson, Q.C. was retained by Ms. Bruce on April 14, 2015, and that by April 20, 2016 "there [had] been a breakdown in the solicitor client relationship and [he was] unable to continue to represent Ms. Bruce.".

[66] Moreover, I note the following:

1. A November 19, 2015 letter from Robert Dickson, Q.C., to defendant's counsel requesting her to [pursuant to CPR 55.14] "please advise whether you will admit or contest the following physician narratives: Dr. Janice MacGregor, family physician (from October 2005 to present date);… Dr. Ian M Dempsey, ENT specialist[August 24 and October 10, 2012 reports to Dr. MacGregor]; Dr. Anita Mountain [February 11, 2013 and November 25, 2013 Ambulatory Care Clinic letter to Dr. MacGregor]."

2. Defendant's counsel responded by letter March 4, 2016, at Exhibit "B", affidavit of Daniel J. MacKenzie sworn November 10, 2016. On May 9, 2016, the court approved the withdrawl of Robert Dickson, Q.C., as solicitor of record. On May 12, 2016, the trial dates were adjourned. Mr. Bureau appeared that day as Ms. Bruce's counsel for the adjournment request only. The court also ordered "throwaway costs" payable in any event of a cause at the end of the proceeding in the amount of $2,000. Otherwise, the parties were to bear their own costs for the motion to adjourn. A Trial Readiness Conference date was set for November 25, 2016. I note that a Notice of New Counsel signed May 12, 2016, by Mr. Bureau was only filed with the court December 2, 2016.

3. By letter dated October 27th and filed October 28, 2016, defendant's counsel wrote to the court requesting a pretrial motion with the trial judge "to address objections to the admissibility of physician narratives and a proposed rebuttal expert report from the plaintiff… [and] that the motion be heard during the week of December 5, 2016." That letter was copied to Mr. Bureau, who on November 2, 2016, confirmed his availability for Friday, December 9, 2016.

4. During argument before me, Mr. Bureau made (uncontested) representations to the court that he has had some difficulty in retrieving a complete copy of Ms. Bruce's file from previous counsel [Robert Dickson, Q.C.] and in organizing, and assessing the status of, the litigation.

5. According to the December 2, 2016, sworn affidavit of Daniel J. MacKenzie, who is assisting defendant's counsel herein: on May 24, 2016, she wrote to Mr. Bureau "regarding the defendant's objection to the proposed treating physician narratives and rebuttal report of Dr. McKelvey"; on July 26, 2016, she wrote to Robert Dickson, Q.C. "confirming that she had received confirmation from Richard Bureau that he had been retained by the plaintiff…"; on August 4, 2016 she wrote to Richard Bureau "regarding the need to address the defendant's objections to the report of Dr. McKelvey" [her letter also states: 'further to our telephone discussion on Friday, July 29, 2016, I have followed up with you on a number of occasions to obtain the notice of new counsel which you indicated to the court you would be filing. Can you please provide me with a filed copy immediately?']; on October 24, she wrote to Richard Bureau "reminding opposing

> counsel of the need for a motion to address the defendants objection to the plaintiffs rebuttal report and the proposed physician narratives";
> on October 24, 2016 Mr. Bureau wrote to Ms. Brothers "regarding the motion to exclude physician narratives and the rebuttal report."

[67] It is clear from this evidence that in May 2016, Mr. Bureau was aware of the trial and filing/finish dates in question. He was repeatedly contacted before August 4, 2016 by defendant's counsel in relation to the status of his retainer and the specific issues in dispute in this motion. As early as October 28, 2016, he accepted the setting down of the hearing of this motion for December 9, 2016. Neither he, nor the plaintiff, made any attempt to have the hearing of these motions heard at an earlier juncture.

[68] In relation to the documents that the plaintiff claims are treating physician narratives (chart notes, referrals, and letters/"opinions" of Dr. Dempsey and Dr. Mountain), per CPR 55.14 (6), the burden is on "the party offering the evidence" – i.e. the plaintiff - to demonstrate that the claimed narratives should not be excluded, by satisfying the court with evidence "that the other party received information about the opinion, and about the material facts upon which it is based, sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician."

[69] Even if equitable considerations such as claimed by the plaintiff herein were factors the court could consider, which I am not confidently satisfied it could, in these circumstances I would not find "that the plaintiff has been unfairly prejudiced by the defendant's abuse of process and unreasonable delay in responding to the plaintiff's November 19, 2015 inquiry with respect to the said narratives and/or reports."

Admissibility of the rebuttal report of Dr. Roger McKelvey

[70] Dr. McKelvey's report was filed with the court on February 16, 2016. The defendant received a copy.

[71] The defendant objects to the admissibility of this report as being non-compliant with CPR 55.05.

[72] He says the report "goes well beyond responding to or rebutting any other expert opinion provided… the report does not state that it is a rebuttal opinion strictly confined to the same subject as the quoted opinion (as it does not quote any

opinion from Dr. King or Dr. Butler)… none of which specifically rebuts any expert opinion from Dr. King, Dr. Butler, or any other physician"

[73] The plaintiff responds that the report is in compliance with CPR 55.05, and in the alternative if not compliant, "then the plaintiff is of the position that she has been unfairly prejudiced by the defendant's abuse of process and unreasonable delay in advising the plaintiff of said alleged deficiencies."

[74] Notably, the deadline for filing rebuttal expert reports for the original May 24 – June 2, 2016 trial dates was March 1, 2016.

[75] Dr. McKelvey's report is touted by the plaintiff as a rebuttal expert's report. The report was filed by the plaintiff on February 16, 2016. Notably, on March 3, 2016, defendant's counsel wrote to the court as follows:

> I am writing to you with regards to correspondence provided by Mr. Dickson on February 16, 2016 enclosing Dr. McKelvey's report dated January 29, 2016 purportedly filing the report as a rebuttal report under Rule 55. The defendant is objecting to the filing of this report with the court as being outside the timelines set forth in Civil Procedure Rule 55.03(2) concerning rebuttal reports. This matter will need to be dealt with by the trial judge in a pretrial motion as to whether or not Dr. McKelvey's report complies with CPR 55.03(2). Can you advise who the trial judge is and please bring this correspondence to their attention.

[76] On March 8, Mr. Dickson wrote to the court that: "Justice McDougall, in his signed Date Assignment Conference memorandum, indicates as follows: 'counsel

have agreed that… any rebuttal reports will be filed… not later than March 1, 2016.'" Thus the February 16, 2016, filing was timely.

[77] Nevertheless, it is the obligation of the plaintiff to ensure that rebuttal reports are compliant with CPR 55.04. A most cursory review of Dr. McKelvey's January 29, 2016 letter reveals that it bears little resemblance to a report which must be compliant with CPR 55.04, as per CPR 55.05(a).

[78] Regarding the remaining obligations in CPR 55.05 (b)-(e):

> b) "the name of the expert with whom the rebuttal expert disagrees and the date of that expert's report" – Dr. McKelvey's report references: "Dr. King, January 17, 2013; page 15; page 22; page 39; page 41; page 43; page 44; November 4, 2015; page 3; page 6 paragraph 6; page 6 paragraph 7". He also references: "Dr. Butler's report… On page 32… On page 31…" - these references could be seen to be generally compliant.
>
> c) "a quotation of the statement of opinion with which the rebuttal expert disagrees" – Dr. McKelvey's report references no direct quotations from Dr. King's report – rather he paraphrases Dr. King's comments – these references could be seen to be generally non-compliant.
>
> d) "a statement that the rebuttal opinion is strictly confined to the same subject as the quoted opinion" – Dr. McKelvey's report makes no such statement, but impliedly attempts to address "the same subject as the quoted opinion" - these references could be seen to be generally compliant;
>
> e) "the rebuttal opinion and no further opinion" – a review of Dr. McKelvey's report reveals pages one, two, and half of the third page, and the last two paragraphs on page 5 regarding "ocular motor disturbances" and "marijuana", are not directly responsive to, or rebut, the expert opinion evidence he was asked to address –these references could be seen to be generally non-compliant.

[79] I also note as well that when the February 16, 2016 filing of his report was made, there was no filing of a "statement of the qualification to be sought from the court" pursuant to CPR 55.09

[80] The real issue is what should be done regarding a loosely written report such as this one – should strict compliance be insisted upon, but the author be permitted to rewrite a compliant report, or should it be ruled inadmissible, in part or in whole?

[81] CPR 55.10 reads:

> (1) A party who receives a report and who wishes to have the opinion evidence excluded at the trial or hearing on the basis that the report does not sufficiently conform with this Rule must, in a reasonable time, notify the party who delivers the report of the deficiency.
>
> (2) A party may make a motion for an order determining whether a report sufficiently conforms with this Rule to permit the purported expert to testify at a trial or hearing.
>
> (3) An order under this Rule is binding at the trial of an action or hearing of an application only on the issue of conformity with Rule 55.04 were 55.05.

[82] The defendant received this report on February 16, 2016. He objected to its timeliness – which objection was without merit. In her letter of March 24, 2016 to then plaintiff's counsel, the defendant's counsel objected to that report for reasons of non-conformity with CPR 55.04 or 55.05. She ended her letter: "Shall I write to the court to advise? I look forward to hearing from you."

[83] On March 29, plaintiff's counsel responded: "it would be helpful if you clarify the objectionable portions of Dr. McKelvey's report, so that I can review them and respond." On March 31, 2016 the defendant's counsel responded in greater detail. That letter outlines the same objections the defendant has taken to that report before me.

[84] Plaintiff's counsel, Robert Dickson, Q.C., was permitted to withdraw as counsel of record on May 9, 2016. On May 12, the trial dates were adjourned, with Mr. Bureau appearing on a limited retainer for that day only, as plaintiff's counsel regarding the adjournment request. It was not until December 2, 2016, that Mr. Bureau filed his Notice of New Counsel with the court, confirming he had been unconditionally retained.

[85] Strictly speaking, Ms. Bruce was self represented during that interval. Defendant's counsel repeatedly sought confirmation regarding the status of Mr. Bureau's retainer throughout that interval. The defendant's counsel had contact with Mr. Bureau, who although not formally on the record, was attempting to assist the plaintiff in dealing with the litigation. Mr. Bureau had confirmed by October 24 that he would be involved in the trial, and as plaintiff's counsel, on October 27, accepted the December 9, 2016, hearing date.

[86] I conclude that both the plaintiff and defendant were reasonably diligent in attempting to address the non-conformity of Dr. McKelvey's report with CPR 55.05 in a timely manner.

[87] CPR 51.03 reads:

> (1) A judge who presides at a trial must exclude evidence of the following kinds, unless the party offering the evidence satisfies the judge it would be unjust to exclude it:
>
> a) Evidence for which notice is required, but for which notice is not given;
>
> b) Evidence required to be disclosed under, but not disclosed in accordance with, Part five – disclosure and discovery;
>
> c) Evidence offered by a party who fails to give the evidence, or to give information leading to the evidence, in response to a direct question asked at discovery or by interrogatory, such as by answering that the party does not know the answer and failing to make disclosure when the answer becomes known or by objecting to the question on the ground of relevancy;
>
> d) Expert opinion not disclosed under Rule 55 – expert opinion.
>
> (2) A judge who admits evidence despite noncompliance with the rules for notice, disclosure, or discovery must consider ordering the party proposing the evidence to indemnify each other party for expenses caused by the introduction of the evidence, including expenses resulting from an adjournment.

[88] Although CPR 51.03(1)(d) speaks to "expert opinion not disclosed under Rule 55 – expert opinion", which involves issues of timing/notice, in contrast to CPR 55.10 which is limited to advance rulings regarding expert opinions that are subject to the reporting requirements of CPR 55.04/55.05, Justice Wood's five relevant factors in assessing injustice under CPR 51.03 are nevertheless helpful in

assessing the parties' argued injustices in the case at bar. He listed them in *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 389, at para. 43:

> 1 - The significance of the witness' evidence and whether it is simply corroborative of other evidence which will be presented.
>
> 2 - Whether the witness and their potential evidence was known or ought to have been known prior to the delivery of the party's witness list.
>
> 3 - The explanation for the failure to include the witness' name on the witness list.
>
> 4 - The prejudice, if any, to the other party arising from the failure to give timely notice of the witness' name.
>
> 5 - The impact on the trial and, in particular, whether the evidence can still be completed within the allocated time.

[89] In the case at bar, I conclude:

1. The evidence of Dr. McKelvey is significant to the plaintiff's case (the defendant has listed on his amended witness list the names of the experts that Dr. McKelvey's opinion seeks to rebut: Dr. David King and Dr. Beverly Butler);

2. Dr. McKelvey's report has been in the defendant's hands since February 16, 2016, and provides generalized, but sufficient notice of Dr. McKelvey's rebuttal opinions by his reference to the page numbers and topic areas contained in Dr. King's and Dr. Butler's reports;

3. As noted above I found both plaintiff and defendant reasonably diligent in attempting to address the non-conformity with CPR 55.04/55.05 of Dr. McKelvey's report;

4. While there may be some specific identifiable prejudice/lack of notice to the defendant, I conclude that any prejudice will be insignificant ultimately given the defendant's opportunity to cross-examine Dr. McKelvey at trial; and

5. While there may be some residual confusion about what are the precise limits of Dr. McKelvey's anticipated expert opinion evidence, and this may require defendant's counsel to take more time than would otherwise be required to effectively cross-examine Dr. McKelvey, I conclude that any such inefficiency will be insignificant ultimately.

[90] On the other hand, I recognize that satisfying the formal requirements in CPR 55.04/55.05 has taken on greater significance in light of the Supreme Court of Canada's decision in *Abbott and Haliburton Co. Ltd. v. White Burgess Langille and Inman (cob WBLI Chartered Accountants)*, 2015 SCC 23. The court, per Cromwell J., at paras. 33-34, states:

> **33** As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?
>
> **34** In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality goes to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

[91] Thus since *Abbott*, the importance of the requirements in CPR 55.04 have taken on even greater significance, since the independence and objectivity of an expert can also be considered and assessed as a matter of admissibility, and not just the weight that a court will give to the expert's opinion.

[92] I have not lost sight of the fact that at the time that this dispute arose in February 2016, counsel had the benefit of these comments from the Supreme Court of Canada.

Conclusion regarding the non-conformity of Dr. McKelvey's January 29, 2016 expert report

[93] While Dr. McKelvey's report provides none of the formality required by CPR 55.04, I conclude that the prejudice to the plaintiff of precluding her from

presenting his evidence at trial is so substantial in these exceptional circumstances that it would be unjust for me to do so.

[94] In substance, Dr. McKelvey's report contains much commentary that cannot be said to be proper rebuttal opinion (to the extent that his report does not address his rebuttal of the opinions of Dr. King and Dr. Butler, it should be redacted – page 1 through 2 and including the first half of page 3, up to the sentence: "You asked me to comment on a number of specific items in the reports that you provided to me. These comments are as follows."); as well as the last two paragraphs on p. 5 of 6, beginning with "Ms. Bruce's ocular motor disburbances…" and ending with "that she has reported since the injury."

[95] In substance, Dr. McKelvey's report does give a generalized notice to the defendant of his rebuttal opinion by referencing Dr. King, and Dr. Butler, and the dates of their reports and page references with topical discussions following.

[96] I therefore conclude, that an appropriate response from the court, for his report's non-compliance with CPR 55.04/55.05, is that the report be re-written and filed by December 30, 2016. That report must satisfy all the strict requirements of CPR 55.04 and 55.05(a).

[97] In these exceptional circumstances, the court will countenance Dr. McKelvey submitting the unredacted pages of his January 29, 2016, report in lieu of strict compliance with CPR 55.05(c), and (d).

Rosinski, J.