IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120529
Docket: M106102
Registry: Vancouver

Between:

Michael Louis Demello

Plaintiff

And:

Shawn Rheal Chaput

Defendant

Before: Master McDiarmid
in Chambers

Oral Reasons for Judgment

Counsel for the Plaintiff	V.J. Le Blanc
Counsel for the Defendant	D. Weinrath
Place and Date of Hearing:	Vancouver, B.C. May 29, 2012
Place and Date of Judgment:	Vancouver, B.C. May 29, 2012

[1] **THE COURT:** In order to provide a decision with sufficient time to enable other matters in this litigation and related litigation to proceed as scheduled, I am giving my decision orally. If a transcript is ordered, I reserve the right to edit or add to flesh out reference to evidence and authorities. This will not change my decision.

[2] The plaintiff was injured in three motor vehicle accidents: January 3, 2009, liability has been admitted; September 2, 2010, liability is an issue; and November 5, 2011, liability is admitted. Assessment of the plaintiff's damages from the first accident is scheduled to be tried by a judge and jury for eight days commencing October 9, 2012. The parties will seek to have the issues from the other two motor vehicle accidents heard at the same time.

[3] The plaintiff has been examined for discovery and will be examined again in July. He has fully complied with extensive document requests save for two which are the subject of this application, namely, physiotherapist records from Peter Lamla and Jennifer Liu.

[4] The defendant argues that these records may relate to causation and level of recovery and provides evidence in affidavit form from a paralegal who has some experience in these matters confirming that physio records may contain this sort of evidence, namely, evidence relating to causation and level of recovery. A sample extract of other physiotherapy records, unrelated to this proceeding, confirms this.

[5] The defendant also points out that the plaintiff is claiming these physiotherapy visits as special damages.

[6] The plaintiff argues that the purpose in requesting these records amounts to a fishing expedition of the kind properly castigated by Justice Davies, and I make particular reference to paras. 33, 81, and 82 of *Kaladjian v. Jose*, 2012 BCSC 357.

[7] The plaintiff further points out (I am referring here to the affidavit of Winnie Ng, and, in particular, paragraphs 6 and 7), that the plaintiff's injuries and the various treatments recommended by Dr. Koss, who I note parenthetically has been the plaintiff's family physician for quite some time, are documented in his clinical

records. These clinical records include the doctor's comments on physiotherapy treatment and its "affect" [sic] - on the plaintiff's injuries. Dr. Koss' clinical records are typewritten and very detailed, extracted as follows:

> 7. Mr. Le Blanc has advised me that the Plaintiff attended an Examination for Discovery on September 8, 2011, and responded to all of Ms. Weinrath's questions, including those regarding his injuries, treatment and questions about pre and post accident health. A further Examination for Discovery relating to the November 5, 2011, accident has been set for July 23, 2012.

There is no contradiction to the evidence given by Ms. Ng in the affidavit.

[8] The law has changed with the advent of the *Supreme Court Civil Rules*. Its present effect was summarized by Master Bouck in *Przybysz v. Crowe*, 2011 BCSC 731. Paras. 34 to 47 of Justice Davies' decision set that test out and incorporate Master Bouck's rationalization of Rule 7-1(1) to the second tiered process of disclosure as she describes it set out in Rule 7-1(11) and (12):

> [34] I accept that, as drafted, former Rule 26(11) and present Rule 7-1(18) contain virtually the same wording in authorizing the court to order production by third parties to the parties to the litigation of relevant documents in the third party's possession and control.
>
> [35] "Documents" also has the same definition under the former Rules and present Rules.
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> [36] There is, however, a significant difference between the document production regimes established under former Rule 26 and present Rule 7-1.
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> [37] Under former Rule 26(1), a party was required to list:
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> > ... documents which are or have been in the party's possession or control relating to any matter in question in the action, ...
>
> [38] Under Rule 7-1(1)(a), a party is now (at least initially) obligated to list only:
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> > (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
> >
> > (ii)all other documents to which the party intends to refer at trial, ...
>
> [39] That change has altered the test in British Columbia for determining whether any document or class of documents must now (at least at first instance) be disclosed.

[40] As stated by Edwards J. in *Creed*, the former broad test of relevance for disclosure purposes, emanated from the decision in *Cie Financière du Pacifique v. Peruvian Guano Ltd* (1882), 11 Q.B.D. 55 (Eng. Q.B.) [*Peruvian Guano*], which required disclosure of documents that "may fairly lead to a line of inquiry which may "either directly or indirectly enable the party ... to advance his own case or damage the case of his adversary"

[41] Rule 7-1(1) changed that test for documentary relevance at first instance by requiring listing only of documents that could be used at trial to prove or disprove a material fact and documents the disclosing party intends to rely upon at trial.

[42] I say that the test of documentary relevance is changed "at first instance" because Rule 7-1 also provides processes by which broader disclosure can be demanded of a party under Rules 7-1(11) through (14) under which the court can decide whether, and if so, to what extent, broader disclosure should be made.

[43] In *Crowe*, Master Bouck discussed those processes in the context of the stated objectives of the present Rules. At para. 23 she stated:

> [23] All of these *Rules* are to be interpreted in accordance with the objective of the *SCCR*:
>
> 1-3(1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
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> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[44] In specific reference to Rules 7-1(11) and (12), Master Bouck then went on to say at paras. 27 to 29:

> [27] ... Those *Rules* contemplate a broader scope of document disclosure than what is required under *Rule* 7-1(1)(a). Indeed, the two tier process of disclosure (if that label is apt), reflects the *SSCR's* objective of proportionality. In order to meet that objective, the party at the first instance must put some thought into what documents falls within the definition of *Rule* 7-1(1)(a)(i) but is not obliged to make an exhaustive list of documents which in turn assists in the "train of inquiry" promoted in *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at pp. 62-63 (Q.A.).
>
> [28] Only after a demand is made under *Rule* 7-1(11) for documents that *relate to any or all matters in question in the action* and the demand for productions is resisted can a court order production under *Rule* 7-1(14). It should be noted that in this case, the demand (and indeed order sought) is for

> production of additional documents, not simply a listing of such documents: see *Rules* 7-1(1) (d), (e) and (f).
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> [29] The court retains the discretion under *Rule* 7-1(14) to order that the party not produce the requested list or documents. Again, the court must look to the objectives of the *SCCR* in exercising this discretion.
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> [45] I agree with those observations which are, in my view, equally applicable to the interpretation and application of Rule 7-1(18).
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> [46] The introduction of the concept of proportionality into the present Rules together with the need for a party to satisfy the court that additional document discovery beyond a party's initial obligations under Rule 7-1(1) must inform the interpretation of Rule 7-1(18). It also satisfies me that cases decided under the former Rule 26(11) are of limited assistance in interpreting and applying Rule 7-1(18) in motor vehicle cases.
>
> [47] It would, in my view, be arbitrary and inconsistent with the objects of the present Rules if the production of the records of a party to litigation in the possession of third parties were to be subject to a pleadings-only *Peruvian Guano* based test of relevance when more narrow tests govern the production of a party's own documents.

[9] The test with respect to discovery of documents in the possession of the plaintiff is one which is equally applicable to documents in the possession of third parties. More than reliance on pleadings is needed. There must be a demand under Rule 7-1(11) and there must be an evidentiary foundation for the documents sought.

[10] In this particular case, the requisite demand has been made. The evidentiary foundation is partially founded on the affidavit of the applicant's paralegal, and in particular, paragraphs 23 and 24, where the extracts from records are referred to together with examples of what may be contained in those records. This evidence was previously referenced by me in para. 4 of these reasons.

[11] Part of the evidence in this particular case that is quite compelling is the proximity of some of the physiotherapy sessions to two of the accidents. The first accident was on January 3, 2009. The physiotherapy records of Peter Lamla are for eight treatments that took place over a monthly period between January 20 and February 17 of 2009.

[12] The second motor vehicle accident was on September 2, 2010. There are several physiotherapy sessions at the Jennifer Liu Physiotherapy Clinic commencing

September 8, 2010, then a second visit on September 13, 2010, and then a number of physiotherapy sessions through to the end of November 2010, and then a few physiotherapy sessions following that in December of 2010 and February and April of 2011.

[13] The notes that are contained in the physiotherapy records may well be relevant to issues of causation and to the course of recovery. If I look at the factors which Justice Davies considered in *Kaladjian*, this is not a situation where merely the pleadings are being relied on. While I appreciate that the plaintiff has been fully compliant in disclosure, it does seem to me that in this particular case these physio records can assist the court and indeed the parties. While there is not a total lack of evidence without these records, unlike what MSP records show, which is merely the date of a visit, these records are likely to be of assistance and add to the evidence, again to assist the court and the parties.

[14] In terms of efficiency and minimal invasion of privacy, the fact of the attendances is not private, as the dates have already been disclosed.

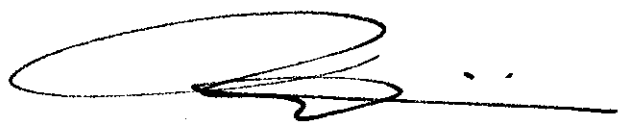
[15] I am mindful of proportionality. This is a case where the plaintiff has been involved in three motor vehicle accidents. Assessment of the effect of those accidents on him may be difficult for the trier of fact. The obtaining of the records can be done easily and efficiently and with minimal further invasion of the plaintiff's privacy.

[16] I should comment that there is a disturbing trend at times to treat every plaintiff as if the mere fact of commencing an action opens the plaintiff to total disclosure of every private element in his or her life. I do not see that happening here. I do not think that is what the defendant here is doing. There is, in this case, no suggestion that the plaintiff has not complied with disclosure requirements. Sometimes we see cases where, without any evidentiary foundation, there are suggestions of dishonesty and non-compliance, and those suggestions are improper. That is not what has happened here. Defence counsel here has tied the relevance of the evidence that can be obtained to these records.

[17] Accordingly, I am prepared to make the order sought. The order in paragraph 1 is that the record holders are to prepare and deliver to counsel for the defendants the records. Paragraph 2, the order is to be promptly entered. Paragraph 3, the records are to be promptly provided to the plaintiff. Paragraph 4, the attendant costs of obtaining the records are to be paid by the defendant.

[SUBMISSIONS RE COSTS]

[18] The appropriate order for costs here is costs to the defendant in the cause.



MASTER McDIARMID