IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20121206
Docket: M103257
Registry: Vancouver

Between:

Mitin Atlabachew

Plaintiff

And

Gul Zaman, Kasmit Singh Kooner, and Jaspal Singh Padda

Defendants

Before: Master Baker

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:	Y. Wong A. King, Articled Student
Counsel for Defendants:	V.C. Gauthier
Place and Date of Hearing:	Vancouver, B.C. December 6, 2012
Place and Date of Judgment:	Vancouver, B.C. December 6, 2012

[1] **THE COURT:** This is an application by the defence for updated records of a medical nature, in particular MSP records from the 17 of May, 2011, to present and as well Pharmanet records from the 6 of April, 2011, to present.

[2] The defence have the MSP records for the period 1 January, 2004, to the 16th of May, 2011, and the Pharmanet records from the 6th of May, 2003, to April 5, 2011, all in respect of a motor vehicle accident which occurred in June of 2008 and which is the subject of these proceedings.

[3] Ms. Wong has pointed out that maybe they have these records, "...but we did not give them to them, it was previous counsel". That I do not think bears on anything other than the inference, I guess, I am invited to draw that had they been asked, they would not have given the records. Again, that does not really affect the decision I have to make. Nobody has argued privilege, nobody has argued waiver of privilege by the earlier delivery of the documents, anything like that.

[4] I think Ms. Gauthier's submissions are short and sweet. These are updated records. They relate to ongoing symptoms, or not, and injuries still ongoing from the accident. Added to that is the fact, apparently, that there were two subsequent accidents which occurred in November of 2008 and in March 2009.

[5] I have no difficulty whatsoever in ordering production of these records. Ms. Wong relies on Mr. Justice Davies' decision in *Kaladjian v. Jose*, 2012 BCSC 357, an appeal from the learned Master in chambers, and in particular on the comments of Mr. Justice Davies at paras. 79 and onward from there. It is worth noting his recitation of the submissions:

> [79] The defendant has submitted that if a plaintiff is dishonest or does not comply with his or her disclosure obligations under Rule 7-1(1), a defendant will be unable to obtain necessary evidence with which to seek production of the plaintiff's MSP records ...
>
> [80] Like the defendant's submissions on efficiency and minimal invasion of privacy, this submission does not recognize the differences between the scope of document discovery and that of examination for discovery under the present *Rules*.

> [81] These "dishonesty and non-compliance" submissions are also disturbing in that they assert that as a class, plaintiffs, their counsel, or both, will not comply with their disclosure obligations.
>
> [82] There is neither legal nor evidentiary support for that assumption or for the suggestion that the present *Rules* should be interpreted to counter anticipated non-compliance.

[6] Those are interesting comments, and I think one should be very, very careful about taking them out of context, and we do not have time or opportunity, nor was I referred to the larger context of the case, except on a few specific points. Taken at their face, it almost seems to question the right of any party to request objective documentation or other form of objective evidence which might corroborate or contradict a party's oral evidence given at trial or in examinations for discovery and that simply cannot be the rule.

[7] As I said during submissions, I tell self-represented litigants all the time that telling me something does not prove it, that they need to corroborate that if there is any reasonable form of corroboration available, such as bank records, medical records, employment records, things like that. That is the whole point of documents in many respects, is to confirm a reality that may have been refracted through people's recollection or perspectives on a problem. I just do not think there is any argument in respect of that.

[8] But beyond that, *Kaladjian* broadly and, probably unfairly stated by me, stands for the proposition that the first two categories, if you will, of documents to be produced, those that will be used at trial or those that may prove or disprove a material fact – not the same thing necessarily – those two categories must be produced based on the pleadings. The pleadings will be the foundation for the measure by which those documents should or should not be produced.

[9] To go beyond that under the new *Rules*, which have tried to change the culture and protocol of the old *Peruvian Guano* standard, the new standard is that, as Justice Davies extremely helpfully, in my respectful view, points out, there must be an evidentiary basis. If you wish to go beyond that essential and initial level of production, you must show an evidentiary basis, or that there has been some actual

and demonstrable dereliction on the part of the other party in respect of those first two categories of documents.

[10] I do not think I need to go to the second step and look for the evidentiary foundation. The pleadings, in my respectful view, bring these documents within the categories for proper initial production. I confess I do not have the advantage of the notice of civil claim, but I do have reproduced, I am told, Part 2, paras. 3 and 4, where various injuries are recited: not that unusual in a personal injury case. Neck, shoulders, back, chest pain, headaches, fatigue, insomnia, and anxiety.

[11] Also at para. 4, the plaintiff is further claiming that she has sustained pain and suffering, loss of enjoyment of life, loss of earnings past and prospective, loss of income earning capacity, loss of opportunity to earn income, and loss of housekeeping capacity past and prospective. It is not that everything turns on those words "prospective," but it does cast the issue into the future, plus the defence is arguing mitigation in this matter, which is an ongoing and, if you will, prospective responsibility to assist in the betterment of your own circumstances.

[12] I think that the updated medical records are well within the category of documents that will help to establish, or not, those aspects. Add to that the subsequent accidents to try and tease out from the factual matrix, that is to say three accidents now, which injuries are properly attributable to the accident before the court in this case, or not, would I think depend in part on what the medical records show.

[13] Finally, in the examination for discovery of the plaintiff, questions 819 onward:

> Q. Have you seen any doctors since January of 2012 with respect to the injuries sustained in this accident? So other than anyone that your lawyer has sent you to.

The reference to "this accident" is the accident before the court today.

> A. Since when?
>
> Q. Early part of this year, January 2012.
>
> A. Yes, I have.

Q. Who have you seen?

A. Dr. Sudol, my physiatrist.

A couple of questions later, she says:

A. I have been to Eagle Ridge Hospital.

Q. Was that only on one occasion?

A. On one occasion, correct.

Q. Why did you go to see the ER physician?

A. Because my back was spasming, I was out of medications, et cetera.

So it is obviously an ongoing problem that the plaintiff attributes to this accident, and I just cannot see any basis for refusing access to the medical records that should confirm her recollection or not. So the order will go.

[14] MS. GAUTHIER: Your Honour, I have an order that – I will vet it.

[15] MS. WONG: And the remainder of the application is adjourned generally because you are doing a consent order; is that right?

[16] MS. GAUTHIER: Yeah, I have – and perhaps because a number of them – there is only 1 to 3 that are in dispute. The other items there we have agreed by consent, with the exception of there is the issue of cost in the last paragraph.

[17] MS. WONG: Which is – it's not in the order.

[18] MS. GAUTHIER: Oh, it's not in the order.

[19] THE COURT: Not in the order. Whoops. It has been signed. Quit while you are ahead. Liability is an issue in this case?

[20] MS. WONG: Yes, it's been denied.

[21] THE COURT: Costs in the cause. Your accident was 2008. When is your trial date?

[22] MS. GAUTHIER: October of next year.

[23] THE COURT: So that is six years. Or no, 2013. That is going to be five years after the accident; is that right?

[24] MS. GAUTHIER: There has been the two subsequent and there's been some other delays, change of counsel.

[25] THE COURT: Five years and liability is in issue. The last case was six years. They are going to set a date in 2015. The accident was three years ago. You are expert counsel in these areas. How does anybody prove liability or disprove it six years later?

[26] MS. WONG: Unfortunately, Your Honour, we're finding it's hard to get trial dates.

[27] THE COURT: Trial dates. Downstairs they can give you a trial date before 2015. They can give you a trial date next year.

[28] MS. WONG: Yes, it's not always the registry. Sometimes it's counsel's calendars.

[29] THE COURT: That is right. That is exactly right. If I sound frustrated, I am, because people are trying to get their cases on and what we have is counsel saying, "I haven't got a single date in 2014". That is absolutely extraordinary.

[30] MS. GAUTHIER: We did have an earlier trial date with respect to this action and because of the other accidents and former counsel –

[31] THE COURT: No, I understand that. No, I get that, but anyway, here we are. My rant for the day.

[32] MS. WONG: Thank you, Your Honour.

[33] MS. GAUTHIER: Thank you.

Master D. C. Baker