COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20121127
Docket: M137581
Registry: New Westminster

Between:

Darren Denney by his litigation guardian Lenny Denney

Plaintiff

And

Danny Wong and Raymond Wong

Defendants

Before: Master Keighley

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	David Perry
Counsel for the Defendants::	Shadrin Brooks
Place and Date of Hearing:	New Westminster, B.C. November 7, 2012
Place and Date of Judgment:	New Westminster, B.C. November 27, 2012

[1] **THE COURT:**

The Applications

[2] Both the plaintiff and defendants have applications before me.

[3] The defendants by application dated October 3, 2012 seek the following orders:

1. The defendants be at liberty to use the documents listed or to be listed on the parties' list of documents including records relating to the plaintiff's prior motor vehicle accident claims to defend this action as they see fit;

2. The costs of this action shall be costs in the cause.

[4] By application dated October 10, 2012, the plaintiff seeks the following orders:

1. The trial of this matter scheduled for three days commencing May 29, 2013 be adjourned and rescheduled for not less than five days on a mutually convenient date;

2. Rule 15-1 ceases to apply to this action;

3. The plaintiff be awarded the costs of this application.

[5] As the bulk of counsels' submissions dealt with the defendants' application, I will deal with it first.

Background

[6] This claim arises out of a motor vehicle accident which occurred on November 29, 2009. The plaintiff is a 35-year-old autistic adult cared for by his disabled father.

[7] Prior to the occurrence of the accident which gave rise to this litigation, the plaintiff was involved in three previous motor vehicle accidents: on April 23, 1989, October 10, 2005, and December 15, 2007. The plaintiff's claims in these three accidents were resolved following the institution of claims and actions on behalf of the plaintiff, and the Insurance Corporation of British Columbia ("ICBC") defended those claims on behalf of the several defendants. Whether those previous claims were resolved by settlement or trial, I do not know. In the course of defending the three previous claims, ICBC and its counsel from time to time, came into possession of various documents which ICBC has retained.

[8] In this action, the plaintiff alleges injuries to his neck, back, shoulders, and feet and says that he suffers from headaches, sleeplessness, depression, anxiety, emotional upsets, and greater susceptibility to re-injury.

[9] The defendants, while admitting liability for the accident, say that the plaintiff's injuries are attributable in whole or in part to previous or subsequent accidents, congenital defects, previous or subsequent conditions or injuries, or intervening acts of the plaintiff, his family, friends, and caregivers.

[10] The defendants note that in the three prior claims, the plaintiff alleged injuries to his back, neck, right foot, ankle, and complained of headaches. As such, they say, the injuries complained of as a result of the most recent motor vehicle accident are similar to those complained of in the prior accidents.

[11] On March 22, 2012, Maria Enns, a paralegal in the employ of counsel for the defendants, wrote to Mr. Brooks, counsel for the plaintiff, in the following terms:

> We have received from ICBC documents relating to your client's prior actions regarding injuries sustained in motor vehicle accidents which occurred on April 23, 1989, October 10, 2005, and December 15, 2007.
>
> Enclosed is a schedule listing these documents. As they are clearly relevant to your client's present claim and have been and continue to be in your client's possession and/or control, they should be listed in your client's list of documents.
>
> In any event, we look forward to your consent to the use of these documents in the current action.

[12] The schedule referred to lists 79 documents or categories of documents dating from 1977 to September 8, 2008 and consists for the most part, although not entirely, of medical records and reports. The documents also include, although this is not evident from a review of the list, the plaintiff's birth records, authorization forms and details relating to the litigation guardian's relationship with the plaintiff's mother, and issues relating to her health, as well as documents relating to the plaintiff's psychiatric care as a child and his adolescent experiences in living with autism.

[13] On April 18, 2012, Mr. Brooks wrote to Ms. Enns on the following terms:

> We write further to your letter dated March 28, 2012 in which you advised us that ICBC has provided you with documents apparently obtained in previous litigation. As you are aware, there is an implied undertaking of confidentiality with respect to all documents produced in litigation. Please provide us with copies of all documents ICBC has provided to you that were obtained from previous litigation and any other documents the responsible ICBC adjuster has reviewed which were obtained from previous litigation.
>
> We disagree with your suggestion that all documents produced in previous litigation are necessarily relevant to the present action. We are prepared to consent to the production of relevant medical records from treating practitioners for a period of five years prior to the date of the subject motor vehicle accident. Please advise which practitioner's records you would like to receive from that timeframe.

Following receipt of that correspondence, Mr. Perry, counsel for the defendants, wrote to Mr. Brooks seeking to have the documents listed in a List of Documents. Mr. Brooks declined to do so, except insofar and the documentation was relevant and further alleged that ICBC's conduct, and that of its counsel, breached the implied undertaking governing the use of these earlier file materials.

The Implied Undertaking "Rule"

[14] Essentially, the rule provides that both documentary and oral information obtained on discovery is subject to an implied (really, Court-imposed) undertaking that such documentation and/or information is not to be "used" by the party obtaining it except for the purpose of the litigation in which it was obtained, unless and until the scope of the undertaking is varied by Court order.

[15] The rationale for the rule is twofold and simple: firstly, pre-trial discovery is an invasion of the litigant's otherwise private right to be left alone with his or her thoughts and papers and requires the revelation of information and documentation which may prove embarrassing, defamatory or scandalous. The second rationale is that a litigant may be encouraged to provide a more candid and complete response to questions and demands for disclosure if he or she has some assurance that the documentation and answers provided will not be used for a purpose collateral to or unrelated to the proceedings in which they were obtained.

[16] When an adverse party incorporates the answers or documents obtained on discovery as part of the Court record at trial, the undertaking is spent but not otherwise except by consent or Court order.

[17] The undertaking is Court-imposed to the extent that the undertaking is to the Court rather than to the parties to the litigation. As such, breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the claim, the striking of the response or even by contempt proceedings. The Court will release a party from this implied undertaking only in limited circumstances. Where the discovery material from one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is said to be virtually non-existent and leave to use it will generally be granted.

[18] Where, as here, a Court order is sought to relieve a party from the duties imposed by the Rule, the applicant must show on a balance of probabilities that his interest in the disclosure sought outweighs the values which underpin the rationale for the implied undertaking. The authority for that proposition is found in a decision of Mr. Justice Williams reported as *British Columbia v. Tekavec et al.* reported at 2012 BCSC 1348.

[19] Now, Williams J. went on to say in that decision, "Of course it goes without saying that the material must be relevant to the issues in the action in which the disclosure is sought".

[20] It is on this latter point that the defendants' application before me must fail. I am simply unable to determine whether the material from the previous actions sought to be referred to by the defendants in this action is relevant in whole or in part. The defendants' application must therefore be dismissed.

[21] But I am still obliged to deal with issue of whether in reviewing the subject documentation and creating a list of such for the benefit of the plaintiff (without any request that they do so), the defendants have breached the implied undertaking rendering them or their counsel subject to judicial censure and/or penalty. In the result, I have determined that no breach has occurred.

[22] In the case of *Chonn* referred to in counsels' correspondence (and that is a decision of Mr. Justice Voith reported as *Eliah Chonn v. DCFS Canada Corp. (c.o.b. Mercedez-Benz Credit Canada), Ulrich Peter Metz and Rolf Kloss*, reported at 2009 BCSC 1474), the learned Justice considered a set of circumstances superficially similar to those before me.

[23] There, the plaintiff had been involved in three motor vehicle accidents between 1999 and 2003. Counsel in the current action had acted for the defendants in the earlier actions and there was a significant overlap the evidence indicated between the types of injuries allegedly suffered in the earlier and the current actions.

[24] In *Chonn, supra*, case the defendants sought an order requiring the plaintiff to deliver a list of documents which would include all records in her possession that were disclosed in the earlier actions (N.B. an application which the defendants might have considered in this case). There, the plaintiff took no issue with the relevance of the documentation sought.

[25] In *Chonn, supra*, the sequence of events was as follows:

1. Defence counsel advised that he possessed relevant file materials from the earlier actions;

2. Plaintiff's counsel asked for a list of the documents which the defence then provided;

3. Upon the failure of the plaintiff to list the documents provided, defence then listed the documents in a supplementary list.

[26] Voith J. considered the applicable law to some length and determined that in listing the documentation in Part 1 of the list of documents, the defendants had "used" the documentation, and has thus breached the implied undertaking, saying at paras. 51 and 52:

> [51] Once a list of documents is delivered by a party, that party is free to use the documents that are properly listed in Part 1 at discovery or trial. This right is largely unrestricted. Thus, it would be incumbent on the recipient of the list, if it was the party to the original litigation, to object to the inclusion of the specific document, effectively reversing the onus established in *Hunt* in relation to seeking exemption from application of the rule.
>
> [52] Second, the creation and delivery of a list of documents in litigation which either involves the original party who made disclosure in an earlier proceeding as well as additional third parties or in actions where the original party is simply not a party to the new litigation, creates the right to access, inspect and obtain copies of all documents contained on Part 1 of the list: Rule 26(7)(9). As the court in *Hunt* recognized, in this latter circumstance the party who first made disclosure will likely not even be aware of the recipient's intention to make further disclosure. Thus, as a practical matter, the creation and delivery of a list of documents to a third party effectively strips the documents which are listed of any protection.

[27] I note that Justice Voith did not go so far as to say that the preparation of a list by the defendants amounted to a breach of the implied undertaking but rather that the formal listing of the documents in a list of documents with its evidentiary consequences did so.

[28] With respect to the plaintiff's obligation to disclose, Justice Voith went on to say at para. 54:

> [54] The plaintiff concedes that the implied undertaking rule does not in any way shield her from her obligation to produce documents in her possession. The fact that the plaintiff considered that the defendants had acted improperly in using documents arising from the Earlier Actions did not constitute justification for holding her own obligations in abeyance. She was

> required to produce all relevant materials in her possession in accordance with Rule 26.

[29] Had the defendants in this case applied for an order requiring the plaintiff to list all documents related to this proceeding, I would likely have granted the order but that application was not before me.

[30] While I do not endorse the practice followed by the defendants in this case, I am not able to find that the defendants have breached the implied undertaking by their conduct accordingly I am not obliged to consider the issues of sanctions or penalty.

[31] In the interests of providing some guidance to counsel in the future, a party in the position of these defendants may wish to consider the following:

1. Advising opposing counsel that he or his client has documentation obtained on discovery in previous litigation in his possession which may be relevant in or to the instant action;
2. Requesting a listing of such documentation in the other party's list of documents;
3. Responding to any request for a list of or copies of the documents;
4. Failing production of a list of documents including such documentation, applying to the Court for an order compelling the listing of such documents.

[32] I will now turn to the subject of the plaintiff's adjournment application.

[33] The matter is presently scheduled for three days of trial commencing May 29, 2013. As indicated, the plaintiff applies for an adjournment of this trial and asks for an order that it be rescheduled for a more realistic estimate of five days.

[34] As the matter is presently governed by the provisions of Rule 15-1, the Fast Track Rule, the plaintiff also seeks to have the matter removed from the Fast Track.

[35] On the subject of adjournment, the plaintiff says as follows: he has been diagnosed with soft tissue injuries to the neck, low back, right calf, a Grade 2 AC joint separation in the right shoulder, an aggravation of pre-existing lumbar degenerative disc disease which has resulted in ongoing chronic myofascial pain and disability. The plaintiff says that his chronic pain is expected to continue for the foreseeable future and will require ongoing physiotherapy, massage therapy, and medication for pain. As previously indicated the plaintiff is autistic and says that he is severely impaired with respect to his ability to communicate.

[36] Counsel says that as a result of the plaintiff's autism, it will be necessary for him to call on the plaintiff's behalf a greater number of collateral witnesses than usual so that they may testify with respect to their specific observations of the plaintiff and give their evidence as to the effect that the accident has apparently had on his health, activity and the quality of his life.

[37] The plaintiff was, as indicated, involved in previous motor vehicle accidents and the defendants in this action have alleged, as indicated, that to some extent his injuries in this accident are a result of injuries that occurred in the previous accidents or are similar in nature.

[38] Plaintiff's counsel says that the defendants have requested and the plaintiff has produced a large number of medical records dating back to November of 2004. In total, medical records to this point amount to documents from 40 different service providers. Counsel says that the plaintiff is continuing to obtain further records. The documents produced in this action to this point, plaintiff's counsel says, take up three large binders and document production is not yet complete as this application evidences.

[39] The plaintiff expects to call, counsel says, two lay witnesses, three treating therapists, one or two treating physicians, and one or two independent medical experts and estimates that direct examination of the plaintiff's witnesses will require between eight and ten hours. In addition, plaintiff's counsel estimates that his opening and closing statements will require a further two hours, suggesting that the

most pessimistic estimates indicate that the entire three days would be taken up with the presentation of the plaintiff's case. As a result, says plaintiff's counsel, the matter simply cannot be completed in three days. In addition, he indicates that it is the plaintiff's intention to seek an award of damages in excess of $100,000.

[40] The test to be applied on applications for adjournment of a trial is well known. It is summarized most succinctly I would think in the case of *Novak v. Bond*, a decision of Madam Justice Martinson, reported at [1998] B.C.J. No. 2034, in which she stated at para. 11 of that decision:

> [11] The question of granting an adjournment is a matter of discretion, to be exercised in accordance with the interests of justice. This requires a balancing of interests of the plaintiff and the defendant: *Sideroff v. Joe* (1992), 76 B.C.L.R. (2d) 82 (C.A.). The paramount consideration that must be maintained in the exercise of that discretion is to ensure that there will remain a fair trial on the merits of the action: *Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 (C.A.).

[41] The application to adjourn it might be fair to say has not been vigorously opposed by the defendants. They point to correspondence from the plaintiff's counsel wherein he agreed to a three day trial and assert that nothing has really changed since that time to justify a longer trial or remove this matter from the Fast Track. No prejudice is asserted by the defendants.

[42] I am satisfied that the interests of justice favour an adjournment of the trial and its rescheduling for five days and its removal from the Fast Track. The challenges facing the plaintiff in presentation of his case and the complexities represented by the medical evidence in particular satisfy me that a fair trial on the merits cannot be conducted within three days or within the restrictions imposed by the Fast Track Rule. Accordingly, the trial is adjourned to be rescheduled for five days or such other estimate upon which counsel may agree and the matter is removed from the provisions of Rule 15-1, the Fast Track Rule.

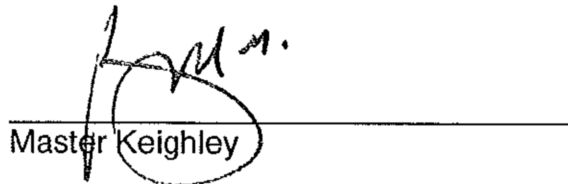
[43] Do you have any submissions with respect to costs, gentlemen?

[44] **MR. PERRY:** I would suggest in the cause, Your Honour.

[45] **THE COURT:** Mr. Brooks?

[46] **MR. BROOKS:** To the plaintiff in the cause. Liability has been admitted so it may be academic whether it is in the cause or to the plaintiff.

[47] **THE COURT:** Yes, all right. The plaintiff will have the costs of one motion in the cause.



Master Keighley