IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110222
Docket: M103201
Registry: Vancouver

Between:

Jan Christine Anderson

Plaintiff

And:

Leslie Allan Kauhane and David Ian Roome

Defendants

Before: Master Baker

Oral Reasons for Judgment

In Chambers
February 22, 2011

Counsel for the Plaintiff	R.A. Holness
Counsel for the Defendants	P.A. Mazzone
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** These are two applications for the production of documents brought by the defendants in proceedings arising from a motor vehicle accident which occurred in April of 2008. The classes of documents are pretty typical of applications such as this; on the one hand, employment-related documents from Ms. Anderson's employer and in respect of Worker's Compensation or WorkSafeBC. Some several days prior to this accident, she apparently had a bench collapse beneath her at work. There is no dispute about that. That matter has proceeded unopposed save and except for the issues of costs which we will deal with eventually. The real issue is the second application, again, much of which is proceeding unopposed relating to the documents in possession of non-parties, all relating to medical circumstances or conditions of Ms. Anderson.

[2] The two categories of documents that are disputed today are those relating to her Medical Services Plan, i.e., MSP record, and her PharmaNet, i.e. prescription record. What is sought is the MSP record from the 1st of January, 2004, onward, as well as the PharmaNet record open-ended. There is no chronological parameter placed on that. Mr. Mazzone indicates that he understands that the maximum one can request or have produced is some seven years and that is the chronology of timeframe he is aiming for today.

[3] All this, I think it is safe to say, arises as a consequence of statements made by Ms. Anderson shortly after the accident in which she advised an adjustor that she had had a back injury as the consequence of a motor vehicle accident approximately five or six years, she said, prior to this motor vehicle accident, in other words, in 2002 or 2003. She also said that she had had no permanent injury as a consequence, that she had not had any problems as a consequence for several years. She said that the only consequence of this particular accident were her shoulder and arm, right side, I believe. She also advised the adjustor that one of the medical professionals treating her was her chiropractor, Dr. Longstaffe, whom she had seen as a consequence of the earlier accident, but had not seen in several years. There is some question about that as all requested family doctor clinical records and chiropractic records, clinical, that is, have been produced as requested

and, in the chiropractic record, there was some indication of her attendance on Dr. Longstaffe in 2007 apparently as a consequence of a possible WCB claim arising from a slip-and-fall at work. I do not think there is a great deal that turns on that. Certainly there is no suggestion either implied or inferred that she was less than forthright with the adjustor at the time when she made her statement and advised him or her about Dr. Longstaffe.

[4] The question is: do the documents in dispute, i.e., MSP and PharmaNet, come within the terms of either Rule 7-1(1)(a), i.e., documents that can be used by a party of record to prove or disprove a material fact or that will be referred to at trial or, if not, do they come under category 7-1(11), generally, in the vernacular, referred to as the *Guano* documents, i.e., relate to all matters in question in the action? There is no question that there is a higher duty on a party requesting documents under that second category, i.e., 7-1(11), that in addition to requesting, they must explain and satisfy either the party being demanded or the court, if an order is sought, with an explanation "with reasonable specificity that indicates the reason why such additional documents or classes of documents should be disclosed," and again, there is no doubt that the new Rules have limited the obligation for production in the first instance to the first category that I have described and has reduced or lessened the obligation for production in general. I say that because it is clear to me that one of the cases referred to by the defendants, that of *Creed v. Dorrie* reported at [1998] B.C.J. No. 2479, a decision of Mr. Justice Edwards, clearly related to that standard, the *Peruvian Guano* standard. That is not the standard in the first instance anymore.

[5] The question today is, would these documents prove a material fact if available? I think not. Firstly, their use at trial is problematic. That is understood in general, but it is also noted by Mr. Justice Chamberlist in the *Wieler v. Bercier* decision, 2004 BCSC 752, but that is not the basis for my decision today, the simple possibility, even likelihood, if that is the case, that these documents will not be provable at trial. I am not satisfied that at this juncture they can or will prove a material fact. The facts, as I understand them, are that Ms. Anderson admitted to an

earlier accident that had injured her back. She said she had been without symptoms or consequence, sequelae, if you will, of that accident for some years.

[6] The defence has medical records from her, at least two treating professionals, which it seems absolutely obvious to me would reflect any contradiction in what she has said; i.e., if there has been back consequence or ongoing pain, disability, that sort of thing, surely it would be reflected in those clinical records either of her family physicians or of Dr. Longstaffe, the chiropractor, and that apparently is not. Certainly I was not pointed to any indications in those records that suggest she had recurrence of her earlier back pain. If, however, on fuller discovery, examination for discovery, for example, or possibly inquiry of other parties, I do not know, other witnesses to the fact, say, it emerges that the statement given by Ms. Anderson is not correct, that she has had difficulty, then it may well be the case that these documents would assist and may prove or disprove a material fact. Today, I am not satisfied that they do.

[7] They are, as I think Mr. Holness described them, corroborative, possibly, I say possibly, of other documents that are out there that can be used and doubtless will be at trial, namely, these clinical records I have already referred to. I acknowledge that the defence has pleaded - and I will say this - in what I think are now becoming boilerplate pleadings, has pleaded pre-existing conditions. It did so, of course, at an early stage, did so not knowing whether, I infer, not knowing whether she did or did not have issues. Although I should not be quite so quick to conclude that because, again, at the very outset, she acknowledged to a representative of the defendant - ICBC, anyway - that she had had this earlier condition. I am not satisfied that, by simple pleading, that somehow opens up the matter to the higher standard represented by 7-1(11). The obligation is still on the defendant to make that case, as far as I am concerned, and that moves me to the second aspect of this, has a case been made under 7-1(11)?

[8] Has there been, in other words, reasonable specificity indicating why the additional documents or classes of documents should be disclosed? I think not. On

the facts before me, I think to simply say, "Look, six years, five years, prior to this accident, she had an event, in this particular case, a motor vehicle accident, in which she, yes, injured her lower back," but in the face of evidence that there has been no difficulty, I am not satisfied that the onus has been met. Mr. Mazzone referred to the overarching obligation under the Rules now to decide and govern matters in a proportionate way and I am not satisfied, as well, that that test has been met. It seems, in the circumstances, disproportionate to me to give an open-ended order that all PharmaNet records, for example, some seven years, or records with Medical Services Plan going back to January the 1st, 2004, are proportionate to the claim as it is expressed and understood at this point. So the application is dismissed.

[9] Now, anything further?

[10] MR. MAZZONE: Just to clarify that, the application for those particular documents is dismissed?

[11] THE COURT: Yes.

[12] MR. MAZZONE: The other orders will go as requested.

[13] THE COURT: Yes.

[14] MR. MAZZONE: Costs in the cause?

[15] MR. HOLNESS: I have no objection to that.

[16] THE COURT: Yes, that is the result, and I am going to remove your orders so that Madam Registrar can have a guide.

[17] This is the first one, it went unopposed. Mr. Mazzone indicated that the numbered company has been changed, and costs are in the cause. So that is the first one.

[18] The second one, costs are in the cause.

for: Master Baker