IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Abougoush v. Sauve,*
2010 BCSC 1776

Date: 20101210
Docket: 84352
Registry: Kelowna

Between:

Michelle Abougoush

Plaintiff

And

Holly Denise Sauve and
GMAC Leaseco Corporation/la Compagnie GMAC Location

Defendants

Before: The Honourable Mr. Justice Rogers

Reasons for Ruling

Counsel for the Plaintiff:	R.D. Watts
Counsel for the Defendants:	M. Davie
Place and Date of Trial/Hearing:	Kelowna, B.C. November 2, 2010
Place and Date of Judgment:	Kelowna, B.C. December 10, 2010

[1] The defendants seek an order pursuant to the court's general power in a case planning conference requiring the plaintiff to:

1. disclose the names of the experts she has consulted;
2. the actual or anticipated dates of her attendance on the experts; and
3. the purpose of those attendances.

[2] The application is opposed by the plaintiff.

[3] The application comes in the course of a case planning conference. The conference was adjourned generally pending this decision. No case plan order has yet been made, and this decision relates to only one aspect of the case plan order that will eventually be pronounced. It follows that this decision will not, in and of itself, result in a fully formed case plan order.

[4] The plaintiff's claim is for recovery of damages consequent to personal injuries she says she sustained in a motor vehicle accident. She says that the accident was caused by the defendants' negligence. The accident happened December 2007. This proceeding is pretty much still in its infancy. The case has not been set for trial and no examinations for discovery have been done.

[5] In Item 4 of her case planning proposal, the plaintiff says that she is receiving ongoing medical treatment for her injuries. She says that subject to her treatment regime, her expert witnesses will include: family medicine, orthopaedic specialist, psychiatrist, physiatrist, neurologist, psychologist and oral surgeon. The plaintiff's case planning proposal does not distinguish that list between those practitioners she sees for the purpose of treatment on the one hand, and the experts she sees at her counsel's behest for the purpose of preparation of medical-legal report on the other.

[6] The defendants rely on two particular paragraphs of the *Rules of Court*. They are:

Rule 5-3(1)(j) and (k), which read:

> (1) At a case planning conference, the case planning conference judge or master may make one or more of the following orders in respect of the action, whether or not on the application of a party:
>
> ...
>
> (j) respecting witness lists;
>
> (k) respecting experts, including, without limitation, orders
>
> (i) that the expert evidence on any one or more issues be given by one jointly-instructed expert,
>
> (ii) respecting the number of experts a party may call,
>
> (iii) that the parties' experts must confer before the service of their respective reports,
>
> (iv) setting a date by which an expert's report must be served on the other parties of record, and
>
> (v) respecting the issues on which an expert may be called;

And Rule 11-1(2), which says:

> (2) Unless the court otherwise orders, if a case planning conference has been held in an action, expert opinion evidence must not be tendered to the court at trial unless provided for in the case plan order applicable to the action.

[7] The defendants say that if a party may not adduce expert opinion evidence at trial unless that evidence has been provided for in a case plan order, then the case planning conference Rule must be interpreted and applied in such a way as to allow the parties and the court to be fully informed about expert evidence well in advance of the trial. This, in the defendants' view, includes requiring parties to inform each other of the names of, dates of attendance, and purpose of attendance upon their experts. The defendants also argue that the court cannot sensibly require a conference between experts or that the parties jointly instruct an expert without first knowing what experts are or will be involved in the matter. Likewise, the parties cannot properly put forward their own position on those issues without knowing who the other side has in its quiver of expert advisors. Finally, the defendants say that the principle of proportionality may be served if the court requires early disclosure of the names of the parties' experts. The defendants point out that if the case is, in the wide scheme of things, straightforward – a damages claim for a minor soft tissue

injury for example – then early disclosure of experts' names and attendance dates may underwrite an order limiting the number of experts to be called at trial. The cost of the trial, at least with respect to experts' fees, may therefore be held to an amount that is in keeping with the nature of the case.

[8] The plaintiff opposes the application on the ground that to order that the plaintiff name her experts at this stage of the case is to strip her of the protection of solicitor-client privilege over the preparation of her case for trial.

[9] I have had the benefit of examining the parties' written arguments, and their reply and sur-reply. Those submissions concentrate on the question of solicitor-client and of litigation privilege generally. I have also reviewed the *Rules* myself, of course.

[10] I will deal first with the least weighty of the defendants' arguments, and that is the proposition that if a case planning conference has been held, then expert evidence may not be adduced at trial without leave without first being provided for in a case planning order. The defendants' position might have been persuasive if the *Rules* had not provided for amendment of the case planning order, see Rule 5-4. I will grant, however, that the combination of Rules 5-2 and 11-1(2) will likely result in serial amendments of case planning orders, one following another as expert evidence becomes available to the parties. It remains to be seen whether that requirement will result in efficiency.

[11] I have decided that the proper approach to the issue raised by the defendants' demand is to look at it as if it had been made in the course of the defendants' examination of the plaintiff for discovery. In that hypothetical discovery, the defendant would be perfectly entitled to ask the plaintiff which medical personnel she had consulted for treatment of the injuries about which she complains. The plaintiff would be bound to answer those questions. That is because treating physicians are witnesses to material facts. Their names are compellable evidence in an examination for discovery: see Rule 7-2(18), and the previous Rule 27(22) as it was interpreted in cases such as *British Columbia (Minister of Forests) v. Bugbusters*, 2001 BCCA 531, and *Shilton v. Fassnacht*, 2006 BCSC 431.

[12] On the other hand, the defendants might ask which experts the plaintiff had seen on her lawyer's advice and whose involvement in the case was limited to responding to her lawyer's request for an expert opinion on a matter in issue. The plaintiff would not have to answer that question. The identity of that expert would be protected by solicitor-client privilege. That proposition is well-known and has been the law of discovery since Seaton J.A. wrote in *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142 (C.A.), at p. 161:

> I would be surprised if parties at an examination for discovery knew which witnesses they would call. If the word "witness" is to be used with respect to this rule, I think it must refer to witnesses to the occurrence that led to the litigation, not witnesses at trial.
>
> ....
>
> Reading RR. 27 and 28 and the *Evidence Act* provisions for disclosure, I conclude that R. 27(22) does not have in mind experts, even though a matter in question in the action might be one upon which expert evidence is to be called. I use the term "expert" to describe a witness with no personal knowledge of the facts giving rise to the issue to which his expertise is to be applied - a pure expert. If that suggestion is correct, the doctor who treated the patient would be a person contemplated by R. 27(22), but the doctor who is called in solely to advise counsel and give expert evidence would not...

[13] In my view, the court's power in a case planning conference should not be read in conflict with other elements of the *Rules*, specifically, the scope of examinations for discovery. Put another way, the court should not require a party to disclose information in a case planning conference that could not be extracted through the conventional discovery process. Rule 7-2(18) recognizes, preserves and protects a party's right to privilege in the context of examinations for discovery. I see nothing in the current *Rules* to suggest that that right should in a case planning conference be sacrificed on the altar of efficiency or proportionality. In my view, a case planning conference may be employed as a tool to adjust the timing of information disclosure. It is not a tool that can be used to pry open otherwise closed doors.

[14] Neither should the case planning conference be used by the court to wrest conduct of the proceeding from the parties. It will always be for the parties to decide which bits of privileged information will be adduced at trial. Certain aspects of the

Rules of Court regulate the timing of disclosure of those privileged bits. For example, the *Rules* say that if a party wishes to rely on an expert opinion at trial, notice of that opinion must be given to the opposition not less than 84 days ahead of trial. The court has the authority to adjust the timing of the party's decision and subsequent disclosure. I do not understand that the *Rules* give the court the authority to take that decision away from a party and to make the decision itself. There is nothing about the present case that suggests that the plaintiff should be required right now to decide which expert reports she intends to rely upon. There is also nothing about the case to suggest that the conventional 84-day notice period will not be adequate.

[15] The defendants' application was aimed solely at Item 4 of the plaintiff's Form 20 case plan proposal. That Item has to do with the experts whose opinions will be offered as evidence at trial. The application must fail insofar as it seeks an order compelling the plaintiff to list the names of the experts in the areas of expertise listed upon whose opinions she will rely at trial. That application must fail because its effect is to unnecessarily accelerate the timing of the plaintiff's election to rely on those opinions.

[16] Although the defendants' application was not aimed at Item 5 of the plaintiff's case plan proposal (list of witnesses), I note for the sake of completeness that Item 5 is concerned only with the procedural step of when witness lists are to be exchanged by the parties. The item does not require parties to actually name the witnesses. The defendants' application could not, therefore, be properly brought in the context of Item 5 of the case plan proposal.

[17] The plaintiff has succeeded in her opposition to the defendants' application. She is entitled to her costs in the cause.

"P.J. Rogers, J."
The Honourable Mr. Justice Rogers