IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Ross v. Henriques,***
2007 BCSC 1381

Date: 20070914
Docket: M85962
Registry: New Westminster

Between:

Tracy Ross

Plaintiff

And

Michael Henriques, Richard Todd Amesbury,
Co-Van International Trucks Inc. also known as
Co-Van Intl. Trucks and Coastal Pacific Xpress Inc.,
Also known as Coastal Pacific Xpress

Defendants

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the plaintiff: T. Spraggs

Counsel for the defendants: T. Pettit

Counsel for T. Spraggs personally: P. Roberts

Date and Place of Trial/Hearing: January 12, 2007
New Westminster, B.C.

[1] Defence counsel Mr. Pettit brings two motions before the court. One motion seeks further document production from the plaintiff as well as document production from third parties. The second motion challenges objections taken by plaintiff's counsel on the examination for discovery of the plaintiff on April 28, 2006, and seeks orders that she answer the questions.

[2] Defence counsel's original notice of motion for documents dated February 27, 2006 sought costs of the action and/or application to the defendants in any event of the cause.

[3] Defence counsel amended his notice of motion on May 8, 2006 specifying particular time periods for some of the third party documents sought as well as seeking as an alternative costs against Mr. Spraggs personally, assessed at $2,000 payable forthwith in any event of the cause.

[4] Both original notice of motion and amended notice of motion seek orders that the third party documents be delivered directly to the solicitor for the defendant, save for any documents coming from the plaintiff's personal

physician Dr. Sam which are agreed to be delivered to the solicitor for the plaintiff initially.

[5] The notice of motion for orders compelling the plaintiff to answer objected questions on examination for discovery also seeks costs in the alternative against Mr. Spraggs personally at $2,000 payable forthwith.

[6] Mr. Pettit submits that the plaintiff's lists of documents are demonstrably non-compliant with Rule 26 and that the court may either impose an order dismissing the claim in whole or in part or order production of specific documents, or order that the plaintiff provide an affidavit confirming the accuracy of the list of documents.

[7] Specifically he says that the plaintiff has not produced clearly relevant non-privileged documents in her possession such as her tax returns despite letter requests from him. The submission is made that in the face of demonstrable lack of compliance with Rule 26 the court should reiterate the requirement to comply with Rule 26 and order an affidavit to confirm compliance.

[8] He submits that the defendants are also entitled to pre-accident medical records of the plaintiff on the basis that she was involved in a prior motor vehicle accident of February 1998 where she also alleged back injuries, had medical treatment and made a claim, and where she was also represented by Mr. Spraggs.

[9] As part of the document application he also seeks particulars of past income loss and special damages which have been requested but have not been provided. It is submitted that on the plaintiff's examination for discovery of April 28, 2006 she was unable to provide any meaningful evidence as to the quantum of her past wage loss although she stated that she had privileged documents in either her or her counsel's possession which could lead to such an assessment.

[10] He submits that there is no basis for Mr. Spraggs to oppose a ***Halliday*** form of production of medical records of Dr. Sam, that are clearly relevant.

[11] This is a reference to ***Halliday v. McCulloch*** 1986, 1 B.C.L.R. (2d) 194. In that case the Court of Appeal suggested that whether privilege is going to be claimed or waived over medical records must first be determined by the patient-litigant who has a right to claim the privilege and he or his solicitor should make the first determination of whether the document is within the privilege. Thereafter any document for which privilege is claimed should be properly described to all adverse parties and the reason for non-disclosure should be set out. This would then permit an application to the court to settle any disputed question on the claim of privilege.

[12] The documents would be delivered by the record keeper initially to the patient-litigant or his solicitor who would then compile a list of documents in accordance with Rule 26 and claim any document as privileged or as not relevant. The solicitor for the patient-litigant would then send the list of documents and copies of the documents being produced to the defendant's solicitor.

[13] ***Jones v. Nelson*** (1980), 24 B.C.L.R. 109, is another decision of the Court of Appeal. In that case Mr. Justice Seaton quoted from ***Dufault v. Stevens*** (1978), 6 B.C.L.R. 199, where Craig J.A. speaking for the court, said at p. 206:

> Having regard to the intent of Rule 26(11) and to the intent of Rule 1(5) and 1(12), a judge should make an order for production and inspection in favour of any party who appears in the application and requests such an order if he decides to make an order for production and inspection, unless there are compelling reasons why he should not do so.

[14] Seaton J.A. suggested that the proper order in that case should be that the plaintiff who was applying deliver a copy of the order to the hospital and within seven days thereof the hospital prepare and deliver one certified copy of the documents to the plaintiff. Thereafter within seven days of receipt of those copies by the plaintiff he/she shall deliver copies to the defendant.

[15] Although the applicant in ***Jones v. Nelson*** was the plaintiff and not the defendant, ***Jones v. Nelson*** is often cited in support of the defendant's application for production and inspection firstly to it, in opposition to the ***Halliday*** form of order where the documents would be delivered first to plaintiff's counsel.

[16] Plaintiff's counsel Mr. Spraggs opposes the defendants' documents motion on the basis that there are no grounds for obtaining an order for an affidavit of documents, that the plaintiff has already provided income tax summaries to the defendants, that he consents to the production of the third party medical records under the ***Jones***

v. Nelson format directly to the solicitor for the defendants and that he does not oppose production of the records of her family physician Dr. Sam under the ***Halliday*** format, directly to him. However he does oppose any requirement to produce edited records of Dr. Sam forthwith to the defendants and requests 21 days to deliver those edited records.

[17] On the issue of costs sought against him personally for failure to produce various documents, Mr. Spraggs submits this application is entirely baseless and without merit and is being used as a tactic to intimidate him when the documents have either already been produced to Mr. Pettit or are not within the plaintiff's possession or control, or have been consented to by him.

[18] Further he submits that the solicitor for the defendants, Mr. Pettit, should himself be personally liable for the costs of the document application or alternatively the defendants should be liable for special costs as the application for personal costs against him personally is an abuse of the court's process.

[19] With respect to the issue of particulars sought for past wage loss and special damages Mr. Spraggs submits that these are ongoing and not subject to particularization at this time.

[20] In response to the application of the defendants for orders that the plaintiff answer objected questions on her examination for discovery Mr. Spraggs submits that her counsel at the examination for discovery, Mr. Elgee, properly objected to questions that were not relevant to her claim for damages arising out of the motor vehicle accident and Mr. Pettit is not entitled to a second examination for discovery.

[21] On this issue Mr. Spraggs submits that as he was not at the examination for discovery the application for costs against him personally is entirely baseless and without merit and is again being used as a tactic to intimidate him.

[22] Finally it is again submitted that counsel for the defendants, Mr. Pettit, should himself be personally liable for the costs of this application, or alternatively the defendants liable for special costs, as this application for personal costs against Mr. Spraggs for the objected questions is an abuse of the court's process.

[23] In Mr. Spraggs' amended response to Mr. Pettit's amended notice of motion of May 8, 2006, he does not oppose the requests for the third party documents sought by the defendants in ***Jones*** format in ¶5, 6, and 7 and in ***Halliday*** format in ¶12 of that amended notice of motion but otherwise opposes all the other applications made.

[24] As a consequence I am able to conclude at this stage that ¶5, 6, 7, 8, 9 and 12 of Mr. Pettit's amended notice of motion of May 8, 2006 are granted.

[25] This leaves for consideration the issues of whether the plaintiff has complied with the requirements of Rule 26 or should be subject to further orders under Rule 26, whether the plaintiff should be obliged to particularize her claim for past wage loss and special damages to date, whether the plaintiff should be ordered to answer the questions which were objected to on her examination for discovery, and whether any costs should be awarded to the defendants from the plaintiff or alternatively from Mr. Spraggs personally at $2,000 or at any other figure.

[26] Alternatively the issue is whether the defendants should be liable for special costs for bringing the applications for personal costs against Mr. Spraggs, as an abuse of court process, or alternatively Mr. Pettit personally should be liable for these costs.

[27] On the remaining applications, it is necessary to set out the background for these applications in some detail.

[28] Mr. Spraggs filed the plaintiff's statement of claim on April 6, 2004. In that statement of claim the plaintiff alleges that she is a certified dental assistant, that on November 16, 2003, the defendants' vehicle was being driven negligently and collided with the vehicle in which she was a passenger, and that she suffered injuries including loss of resistance to further injuries, injuries to her head, neck, back, left shoulder, left forearm, left hip and shins, with bruising, difficulty sleeping, headaches, general stiffness, pain and discomfort, nervous tension, depression, anxiety, apprehension, shock, and other injuries.

[29] In addition it is alleged that she has suffered special damages, the figures of which it is stated will be supplied upon request as they become available. It is also alleged that she has suffered a loss of wages and will continue to suffer future wage loss.

[30] She alleges that as a consequence of the defendants' negligence and her injuries she alleges that she has suffered and will suffer the loss and enjoyment of the amenities of life and has been unable to fulfil and will in the future be unable to fulfil the duties and activities of employment, sports activities, social activities and household chores.

[31] Mr. Pettit's statement of defence was filed on May 9, 2005 and includes a denial of negligence, a denial that any acts or omissions of the defendants were the proximate cause of the alleged collision or any resulting injury, loss, damage or expense suffered by the plaintiff, alleges that any injuries were not caused by the motor vehicle accident but are attributable to previous and/or subsequent incidents involving the plaintiff, or to congenital defects, and alleges that the accident did not aggravate any pre-existing injuries.

[32] On April 28, 2005, Mr. Pettit sent to Mr. Spraggs a demand for discovery of documents. Mr. Spraggs responded on May 10, 2005, enclosing a list of documents of the plaintiff. Listed are two medical notes from Dr. Sam of November 18, 2003, a May 14, 2004, letter to ICBC requesting reimbursement for various receipts, a January 4, 2004, CL15 certificate of earnings, and a December 19, 2003 wage loss information document from Dr. Randy Allan. In addition four other documents are listed dealing with vehicle registrations and the ***Motor Vehicle Act***, R.S.B.C. 1996 ch. 318, and 14 colour laser photos of the plaintiff.

[33] In the privileged section of the list, no specific documents are listed as privileged save for a statement dated November 26, 2003. The claim of privilege is stated to be related to solicitor/client communications and settlement discussions.

[34] On July 20, 2005, Mr. Pettit wrote Mr. Spraggs dealing with a number of matters including that he required strict compliance with Rule 26 and that he expected the plaintiff to produce all documents bearing on the issues in the action including personal documents, letters, photographs, videotapes, notes, as well as the usual medical and employment related documents. He also sought specific disclosure under Part 3 of the list of privileged documents.

[35] Notice at that time was given that the defendants would be requesting documents from third parties and where appropriate and convenient would direct any enquiries through Mr. Spraggs office.

[36] On August 10, 2005, a formal admission of liability for the motor vehicle accident was made by Mr. Pettit leaving only the issue of assessment of damages for determination.

[37] On that same day, August 10, 2005, Mr. Pettit wrote Mr. Spraggs requiring an MSP claim history for the period January 1, 1997 to the present, clinical records of Dr. Sam from that time to the present, clinical records of a chiropractor and another doctor, and employment records from Dr. Randall Allan and Dr. Ivor Levin, along with the plaintiff's income tax returns for the tax years 2001-2004 inclusive.

[38] Mr. Pettit included in that letter authorizations directed to the third parties and asked that they be executed by the plaintiff and returned to him as soon as possible. He promised to provide copies of any records received by him as a result of the authorizations.

[39] In his letter Mr. Pettit indicated that if he did not receive the executed authorizations within ten days he would proceed to chambers seeking an order for production and would bring the letter to the attention of the chambers judge on the issue of costs.

[40] This elicited a response from Mr. Spraggs of August 12, 2005, dealing in part with the issue of medical records. In that letter Mr. Spraggs informed Mr. Pettit that "it is our policy to protect our client's privacy and legal rights by receiving all of the clinical records in the first instance, to be reviewed by our client before they are forwarded to ICBC or defence counsel."

[41] He set out his position that the medical records are privileged since they may contain material that is not relevant or material to the case and could be prejudicial to his client.

[42] He stated his position that he would not oppose production of the medical records provided that they are not pre-accident, that they are produced on a ***Halliday*** basis, and that he be entitled to his costs.

[43] He further indicated his position that the medical records should be produced by way of court order and he made reference to the ruling of Master Joyce (as he then was) in ***Taber v. Fritz***, May 14, 1996, New Westminster, S023370.

[44] In ***Taber v. Fritz*** the parties had applied by consent for a desk order under then Rule 44(13), for the production of documents in the possession of third parties. Those documents were again clinical records and hospital records as well as employment records. Although the parties had consented to the order the order itself was not endorsed by the third parties who had possession of the documents.

[45] In ***Taber v. Fritz*** the parties did not rely upon Rule 41(16) but rather on Rule 44(13). Master Joyce found that proper notice had been given to the third parties as required by Rule 26(11), in the form of delivering to the third parties a draft order along with a letter advising them of the intention to seek the order and requesting that if they had any objection to the making of the order they should give notice of their objection within seven days.

[46] Master Joyce concluded that the plaintiff had met the requirements of Rule 44(13) requiring consent and Rule 26(11) requiring notice to the third parties and endorsed a procedure whereby a draft consent order is sent to the third party as notice, with no response being taken as a lack of objection.

[47] Mr. Spraggs suggested that the best way to obtain production of medical records was by way of a court order in ***Halliday*** format in accordance with the ruling in ***Taber v. Fritz***.

[48] Mr. Spraggs also referred Mr. Pettit to the comments of Master Brine (as he then was) in ***Dowell v. Glemnitz et al***, October 19, 2001, New Westminster S062984, where he said:

> When the records being sought are those of the family physician, who presumably has treated the plaintiff for any number of matters, including motor vehicle injuries received as a result of a motor vehicle accident, those records should probably be produced on a ***Halliday*** basis simply because there – I think its reasonable to infer that there could well be other completely irrelevant and unrelated examinations or attendances that the plaintiff has had upon their doctor.

[49] In Mr. Spraggs' view, the message from that statement was clear that the law wanted medical records to be obtained by way of court order in ***Halliday*** format and for that reason he had followed that practice ever since.

[50] With respect to the MSP printout that Mr. Pettit had requested, Mr. Spraggs indicated that he had no objection to having that printout produced for a period of six months prior to the motor vehicle accident, by way of an authorization in ***Halliday*** format. If the plaintiff's authorization was not produced for some reason, Mr. Spraggs required Mr. Pettit to proceed by consent desk order in accordance with ***Taber v. Fritz***, that he insisted be in ***Halliday*** format so that if his client had specific privacy concerns he would follow the law with respect to production of documents as set down in ***Halliday***.

[51] In a letter of August 16, 2005, Mr. Spraggs took issue with Mr. Pettit's threat to go to chambers if the authorizations were not completed and stated that his client did have privacy concerns that necessitated a ***Halliday*** form of order.

[52] On September 23, 2005, Mr. Spraggs had his client swear an affidavit stating that she has privacy concerns with respect to her medical and income tax records as she is aware that they contain information that is not relevant to the action and she wants an opportunity to review them before they are provided to counsel for the defendants. She says she does not want her income tax returns produced for the years 1998 to the present because she believes these records are embarrassing and are not relevant to this action and she wishes to protect and maintain her privacy and confidentiality in all lawful regards over such material.

[53] Specifically with respect to clinical records she says that she has seen caretakers for reasons other than the motor vehicle accident and believes that these records are embarrassing and are not relevant to this action and she wishes to protect and maintain her privacy and confidentiality in all lawful regards over such material.

[54] On September 27, 2005, Mr. Pettit wrote Mr. Spraggs enclosing a consent order for the production of the third party clinical records and the employment records, for his execution and return, and stated that in accordance with the procedure as suggested in ***Taber v. Fritz*** he would send a copy of the draft consent order to each of the suppliers of records set out in the draft order. He also enclosed a consent order for the production of the MSP claim history report for Mr. Spraggs' endorsement and return. Although not stated in the letter Mr. Pettit drafted the consent orders on the ***Jones*** format rather than the ***Halliday*** format.

[55] With respect to the plaintiff's income tax returns requested for the years 2001 – 2004 inclusive he submitted that as the plaintiff had claimed loss of wages and other related relief her obligation was to produce her tax returns

pursuant to Rule 26.

[56] By letter of October 12, 2005, Mr. Spraggs again raised his client's privacy concerns and stated that if Mr. Pettit did not agree to production of third party records by way of a ***Halliday*** order in accordance with the ***Taber v. Fritz*** procedure, then chambers would be required.

[57] On February 24, 2006, Mr. Pettit wrote Mr. Spraggs demanding particulars of the plaintiff's claims for past income loss and special damages.

[58] On February 27, 2006, Mr. Pettit served his first document motion and affidavit and gave available dates for chambers. He indicated that if he did not hear back from Mr. Spraggs by March 10, 2006, he would set the matter down unilaterally without further notice.

[59] Upon receiving Mr. Pettit's motion materials Mr. Spraggs wrote to Mr. Pettit on March 7, 2006 referring to the language in the notice of motion as being vague, inflammatory and open to abuse if granted, and enclosing his initial response to the defendants' notice of motion denying all applications except for payment of costs by the defendants along with two affidavits, one being the affidavit of the plaintiff of September 23, 2005.

[60] On March 12, 2006, Mr. Pettit wrote Mr. Spraggs a letter asking him to clarify if the issue on his motion was going to be the relevance of the third party documents or simply whether they should be produced under the ***Jones*** format or the ***Halliday*** format.

[61] In addition he indicated that he would be amending his notice of motion to seek costs against Mr. Spraggs personally in the sum of $2,000 and would be delivering the amended notice of motion shortly.

[62] This prompted Mr. Spraggs to respond with a letter of March 31, 2006 putting Mr. Pettit on notice that he would be seeking personal costs against him as well and alleging that Mr. Pettit's application for costs against him was without foundation and was outrageous, scandalous and reprehensible.

[63] On April 24, 2006, Mr. Pettit wrote to Mr. Spraggs indicating that his instructions were to continue to seek personal costs against him for non-cooperation in obtaining various records. However he was delaying bringing the application in the hopes that Mr. Spraggs would begin to cooperate and indicated that from his perspective it was a relatively straightforward and simple matter for Mr. Spraggs to have his client down to his office to sign authorizations to enable either his office or Mr. Pettit's office to obtain the third party documents and thus avoid chambers activity and a waste of the court's time.

[64] Mr. Pettit went on to say that as he understood Mr. Spraggs had a policy whereby he would simply not cooperate in this fashion he was prepared to seek costs against him personally rather than his client. He suggested that Mr. Spraggs' policy was inconsistent with the general practice of obtaining records in personal injury actions and it put the courts, litigants and third parties to unnecessary time and expense. In his view while Mr. Spraggs might have a technical right to do this it was an obstructionist policy.

[65] This allegation of obstructionist policy prompted Mr. Spraggs to send a further letter to Mr. Pettit of May 1, 2006 enclosing his amended response of the plaintiff and another affidavit and confirming that regrettably he would also be seeking personal costs against Mr. Pettit in the amount of $2,000 as Mr. Pettit indicated he would do to him.

[66] As stated the amended response of the plaintiff did not oppose production of the third party documents, save for Dr. Sam's records, to Mr. Pettit, by a ***Jones*** order.

[67] The examination for discovery of the plaintiff took place on April 28, 2006. Mr. Pettit conducted the examination of Ms Ross and Mr. Elgee of Mr. Spraggs office attended on her behalf. A number of objections were made to questions posed to the plaintiff that form the subject matter of Mr. Pettit's second application.

[68] On May 2, 2006, Mr. Pettit advised Mr. Spraggs that he was combining his two motions together which would delay matters somewhat.

[69] On May 8, 2006, Mr. Pettit served Mr. Spraggs with his amended document motion seeking alternatively personal costs against Mr. Spraggs, and his discovery objection motion also seeking personal costs in the alternative against Mr. Spraggs.

[70] After some further delay Mr. Spraggs wrote Mr. Pettit again on June 2, 2006 informing him that he

considered his actions in seeking personal costs against him to be reprehensible and worthy of sanction and that he would likely receive a significant sum of special costs against him personally pursuant to Rule 57(37)(c). He offered Mr. Pettit an opportunity to withdraw what he termed outrageous and improper allegations.

[71] Shortly after that on June 9, 2006, Mr. Spraggs sent another letter to Mr. Pettit which was identical to his letter of August 12, 2005, previously discussed herein.

[72] On June 22, 2006, Mr. Spraggs withdrew his offer to allow Mr. Pettit to withdraw his allegations and again informed Mr. Pettit that he would be seeking personal costs against him as well.

[73] This prompted Mr. Pettit to reply to Mr. Spraggs on June 26, 2006, inviting Mr. Spraggs to bring a motion against him personally or to bring a motion to have him removed as defence counsel or make a complaint against him to the Law Society or a combination thereof or none of the above, but stating that thereafter there was no utility in corresponding further on the matters.

[74] On October 2, 2006, Mr. Spraggs forwarded to Mr. Pettit the plaintiff's 2001 – 2005 income tax printouts.

[75] The battle lines were drawn and the motions commenced before me on January 12, 2007. Mr. Spraggs appeared for his client Ms Ross, Mr. Pettit for the defendants, and Mr. Roberts as counsel for Mr. Spraggs personally.

[76] Mr. Pettit filed written submissions on the different issues. He was followed by Mr. Roberts who spoke on the application for personal costs against Mr. Spraggs, Mr. Pettit responded to Mr. Roberts' submissions, and then Mr. Spraggs began his submissions, orally, without completing that day.

[77] Written submissions were ordered from Mr. Spraggs, with written reply from Mr. Pettit.

[78] Mr. Pettit's submissions were broken down into the categories of the Rule 26 obligations on the plaintiff to produce a proper list of documents, the responsibility of the plaintiff to provide particulars of special damages and past income loss as requested, the defence request for third party documents by authorization and the response of Mr. Spraggs, the objections at examination for discovery of the plaintiff and the claim for costs.

[79] I will consider these categories in the same order.

1) The plaintiff's list of documents

[80] Mr. Pettit submits that the plaintiff's list of documents delivered on May 10, 2005, was woefully deficient and not in compliance with Rule 26 in that:

a) On her examination for discovery on April 28, 2006, she admitted that she files tax returns, that she keeps her tax returns and that she has them at her home, although she had not given copies or originals to her lawyers. To date she has only produced tax summaries and has never produced her full tax returns.

b) The plaintiff's tax summaries produced confirm that she did engage in business income in 2002 and 2003, prior to the motor vehicle accident of November 16, 2003, involved in this action. Although she claims for income loss in this action she has not produced any documents related to her past income which she must have, including her own records of employment.

c) On her examination for discovery the plaintiff was asked whether she had any documents which would help her answer the question of how much time she took off work after the November 16, 2003, accident and she indicated that she kept a diary on the advice of counsel which was either in her possession or in the possession of her law firm. When asked why the diary had not been disclosed she claimed privilege and when she was asked why she had not listed it in the privileged portion of her list of documents, the question was objected to.

d) The plaintiff was involved in a prior motor vehicle accident in February, 1998, from which she alleged injuries and settled with the Insurance Corporation of British Columbia. In that action she was represented by Mr. Spraggs' law firm but on her examination for discovery the request that she produce any relevant documents from the law firm file for the February, 1998, accident was objected

to. A review of an electronic file of ICBC indicated payments to and on behalf of Ms Ross in 1998 through to 2000 including a payment on December 15, 1999, of $33,000 to Spraggs and Company made up of general damages of $26,700, special damages of $1,000, future care costs of $2,500 and costs and disbursements of $2,800.

e) When the defence sought to question the plaintiff at examination for discovery on her efforts to disclose all documents the questions were objected to.

[81] Mr. Pettit submits that together with a plaintiff's duty to ensure full disclosure of all relevant documents Mr. Spraggs has a corresponding duty to ensure that his client make full disclosure of all documents even though the ultimate responsibility might rest on the client herself. Here it is submitted that not only has the plaintiff not taken any steps to comply with her obligations but there is no evidence that she has been encouraged to do so by Mr. Spraggs.

[82] Mr. Pettit submits that as a remedy the court can either order the plaintiff to comply with Rule 26, by a supplementary list of documents, or order under Rule 26(3) that the plaintiff deliver an affidavit verifying a list of documents, or strike out the plaintiff's claim for failure to properly list her documents. In this case Mr. Pettit submits that it would be appropriate to order an affidavit of documents be provided.

[83] Mr. Spraggs submits the plaintiff has provided all that is necessary by her tax summaries and she has deposed that she believes her full tax returns contain embarrassing entries that are not relevant to this action, and she wishes to protect and maintain her privacy and confidentiality over such materials.

[84] He submits that there is no evidence that the plaintiff has any ongoing injuries from her 1998 accident and no claim is made by her for aggravation of prior injuries, so that any pre-accident medical information in his view is irrelevant.

[85] He submits the defendants' pleading that the plaintiff's injuries were caused by previous and/or subsequent incidents and pleading that the 2003 accident did not aggravate any pre-existing injuries, do not make pre-accident medical records relevant without any evidentiary basis.

Discussion

[86] The defendants in my view are entitled to copies of the full income tax information of the plaintiff from 2001 onwards. She is making a claim for past and future income loss and her history of income earned from any source prior to the 2003 motor vehicle accident is in my view relevant to that claim.

[87] The plaintiff will list on a supplementary list of documents all of her complete tax returns including T4 slips and other related documents as set out in ¶3 of the Amended Notice of Motion for the years 2001-2006 inclusive. She will also list all employment records in her possession or control relating to her work history for that same period of time as well as any other relevant documents required under Rule 26, including her diary.

[88] If the plaintiff claims that some of this information is not relevant or is privileged for some reason then she will have to state that in her supplementary list and set out the grounds for that position as Rule 26 requires. If the defendants challenge that position they can apply again to court and the court will then review the unedited documents to determine their production and deal with any attendant costs.

[89] At the present time I have some doubts whether there will be anything in the plaintiff's full tax returns or employment files that are not relevant to this action or are covered by the claim of privilege but that remains to be seen.

[90] The plaintiff will also list on her supplementary list of documents all documents within her possession or control dealing with the injuries she sustained in the 1998 motor vehicle accident, and any medical treatments that she received thereafter up to the time of the 2003 motor vehicle accident. Again, any claim for privilege must be made for included documents so that it can be challenged if appropriate.

[91] Under Rule 26(1) the plaintiff has an obligation to make discovery of all documents which are or have been in her possession or control relating to any matter in question in the action.

[92] I consider that the plaintiff's medical condition at the time of the 2003 accident has been put in issue in this action. I am satisfied that the fact that the plaintiff had a previous motor vehicle accident in 1998 in which she alleged back injuries and perhaps other similar injuries for which she received treatment and compensation from ICBC in an amount of over $30,000, puts her medical condition at the time of the 2003 accident in issue.

[93] The defendants have pleaded that the injuries in the 2003 accident are attributable to previous and/or subsequent incidents and the 2003 accident did not aggravate any pre-existing injuries, and in my view, that pleading plus the allegations of injuries that the plaintiff made from the 1998 accident and the compensation she received, is enough to make the injuries from her 1998 accident relevant to this claim. The defendants are not able to lead any further evidence of pre-existing injuries when the only other source would be the plaintiff herself who to date has refused to answer relevant questions on the examination for discovery.

[94] The plaintiff's duty is to disclose all documents which are or have been in her possession or control and in my view that includes any documents that are still in the possession of Mr. Spraggs' office concerning the 1998 accident that deal with the plaintiff's injuries in that accident, their treatment, and any future income claim from that accident. If solicitor/client privilege is claimed for any document, it must be stated in the list with respect to specific documents and not a generalized statement only so that any court challenge to any claim of privilege can be considered.

[95] Further, I also order the plaintiff to deliver an affidavit verifying that her supplementary list satisfies the full requirements of Rule 26 and these reasons. I am satisfied that no adequate explanation or reason has been given for the inadequate first list of documents.

(1) Particulars requested

[96] Mr. Pettit submits that a party must plead particulars of special damages, relying upon ***McLachlan and Taylor British Columbia Practice, Third Edition***, which states that special damages must be specifically pleaded in the body of the statement of claim, the pleadings must be supported by material facts, and particulars of special damages should include both the amount of loss and damage suffered and how that amount is made up and calculated.

[97] Mr. Pettit submits that case law establishes that pre-trial income loss particulars have also been ordered by the court.

Mr. Spraggs' position is that details of past wage loss are not issues properly the subject of an order for particulars but rather evidence to be addressed at the examination for discovery. He points out that the application for particulars was brought prior to the examination for discovery of the plaintiff and therefore should be considered in the light of those circumstances, as opposed to after the examination of the plaintiff that has already been conducted for one day. He says that since the plaintiff's examination has taken place the plaintiff would be pleased to provide particulars of the past wage loss if the defendant can clarify whether or not they are still required following the examination for discovery.

[98] It is his submission with respect to the application for particulars of past wage loss that Mr. Pettit is really seeking evidence of the way in which the past wage loss will be proved as opposed to a delineation of that issue.

Discussion

[99] In the statement of claim at ¶12 the plaintiff has plead that she has suffered special damages and will supply the figures upon request as they become available.

[100] The defendants have requested this information and accordingly the plaintiff will be ordered to provide particulars of her claim for special damages to date, forthwith.

[101] The plaintiff has also claimed past and ongoing wage loss. I do not consider details of past wage loss to date to be a method or mode of proving that loss but a delineation of that loss.

[102] Mr. Spraggs says in his written submission that the plaintiff will be pleased to provide particulars of her past

wage loss if the defendants can clarify whether or not they are still required following the examination for discovery of the plaintiff that has been held.

[103] In my view they are necessary to be provided at this point in time. In her examination for discovery on April 28, 2006, the plaintiff said that she lost a good three to four months of work as a result of her injuries and maybe even more. However she said she did not know how long she was completely off work. She said she might gain some knowledge from her diary which she claimed to be privileged.

[104] Particulars are needed of the past wage loss claim to date before any further examination for discovery is conducted of the plaintiff and the plaintiff will be ordered to provide that information to date, forthwith.

Objections at Examination for Discovery

[105] At question 47 of the examination for discovery transcript, Mr. Pettit questioned the plaintiff whether there was ever an event in the past before November 16, 2003 that led to a loss of resistance to further injuries on her part.

[106] The plaintiff alleges in her statement of claim at ¶10(a) “loss of resistance to further injuries”.

[107] The question was objected to on the basis that “ever is a long while”. Thereafter an exchange took place between counsel as to whether Mr. Pettit should start with a time period within six months of the accident and see how the plaintiff answered. Mr. Elgee, appearing for the plaintiff, took the position that if there was nothing in the last six months then that was the end of it.

[108] This same issue occurred at question 49, where Mr. Pettit asked the plaintiff whether she ever suffered a head injury prior to November 16, 2003 and again Mr. Elgee made the objection that it was too far back unless Mr. Pettit could create a foundation.

[109] Mr. Pettit then asked at question 51 whether the plaintiff ever suffered a neck injury prior to November 16, 2003.

[110] Allegations of neck injuries and head injuries are the second and third alleged injuries in ¶10 of the statement of claim.

[111] Again, Mr. Elgee objected to the use of the word “ever”. In his view a reasonable time period was needed.

[112] Mr. Pettit then asked whether Mr. Elgee would be objecting to the same sort of question relating to every allegation of injury alleged in the statement of claim and Mr. Elgee confirmed that he would be.

[113] At question 55 Mr. Pettit asked the plaintiff whether she had ever made an ICBC claim before the accident or even within a five year period before the accident and objections were taken to both questions.

[114] At question 57 Mr. Pettit asked whether the plaintiff had been involved in a motor vehicle collision on February 20, 1998 in which she was represented by Mr. Spraggs and settled the case for $27,500.

[115] The objection was taken by Mr. Elgee that it was not relevant.

[116] When asked for the basis for his objection, Mr. Elgee said that if it could be established that the plaintiff had some ongoing injuries and was making a claim in that regard that would be different. But the fact that something happened five or seven years ago is not relevant.

[117] At question 59 Mr. Pettit asked the plaintiff whether she was injured in that February 1998 accident and that was objected to.

[118] At question 60 Mr. Pettit asked the plaintiff if she ever recovered from injuries suffered in the February 1998 accident and Mr. Elgee objected again on the basis that Mr. Pettit was starting too far back as she was not claiming for aggravation of pre-existing injuries so that it was not relevant.

[119] At question 62 Mr. Pettit asked the plaintiff when she last saw a medical practitioner including therapists and chiropractors in relation to the February 1998 accident and Mr. Elgee objected again on the basis that she should be asked if she had been seeking medical attention six months prior to the 2003 accident.

[120] At question 63 Mr. Pettit asked the plaintiff when she hired Mr. Spraggs to represent her in relation to her February 1998 accident, did she make any allegations of a permanent injury. Again that was objected to my Mr. Elgee.

[121] At question 65 Mr. Elgee stated that he was going to object to any questions that went back to a 1998 accident.

[122] At question 66 Mr. Pettit asked the plaintiff whether she made any allegations of future income loss suffered in the February 1998 accident and Mr. Elgee objected again.

[123] At question 67 Mr. Pettit asked the plaintiff whether prior to November 16, 2003 she had ever made a WCB claim and that was also objected to. When Mr. Pettit asked whether she had ever made a WCB claim in the five years prior to the accident that was objected to as well, as was the question related to three years but Mr. Elgee took the position that if she said yes to one year prior to the accident then Mr. Pettit could ask about three years.

[124] At question 71 Mr. Pettit asked the plaintiff whether she had ever made any claims for insurance disability benefits prior to the accident of November 16, 2003 and again that was objected to as was the question related to within five years prior.

[125] At question 79 Mr. Pettit asked the plaintiff whether at the time of the November 2003 accident she had any medical conditions that affected her ability to earn income. The plaintiff asked whether the question was with respect to her ability to earn income at that precise time and Mr. Pettit sought to clarify by stating “or later”.

[126] Mr. Elgee objected to the question because he thought the witness was having trouble understanding the question and he was objecting to general questions.

[127] At question 81 Mr. Pettit asked the plaintiff whether she had any problems with her head in the six month period prior to the November 2003 accident. Mr. Elgee questioned whether that included headaches and the plaintiff questioned whether that included toothache and earache and Mr. Pettit clarified that it was anything to do with her head.

[128] Mr. Elgee objected on the basis that the question was too broad.

[129] At question 92 Mr. Pettit asked the plaintiff whether she had headaches in the two years prior to the accident and she answered “yes”. She also answered “yes” to five years prior but when Mr. Pettit asked about ten years prior, Mr. Elgee objected to that.

[130] At question 95 Mr. Pettit asked the plaintiff whether she had any neck problems of any type in the six months prior to the accident and her response was “that’s a long time ago”.

[131] Mr. Elgee advised her not to guess and that if she did not recall to say so and she responded “I don’t recall”.

[132] At question 98 Mr. Pettit asked the plaintiff whether it was possible she had neck troubles in the six months prior to the accident and Mr. Elgee objected on the basis that she can’t remember and anything was possible.

[133] At question 104 Mr. Pettit asked the plaintiff whether she had back troubles in the six months prior to the accident and she answered “some”. He extended that question to 12 months prior to the accident, and two years prior to the accident and five years prior to the accident and in each case the answer was “some”. When he asked her about 10 years prior to the accident, Mr. Elgee objected on the basis that there was no purpose being served in going back any further.

[134] At question 165 Mr. Pettit made a request that the plaintiff inform herself as to the name of the clinic and massage therapist who she saw in 2005 and who she also saw a year or so before the accident. His request was taken under advisement.

[135] At question 166 Mr. Pettit asked the plaintiff whether she recalled when she first saw this massage therapist and she answered “no”. He then asked her at question 167 if she recalled if she saw this massage therapist in relation to her February 1998 accident and injury. Mr. Elgee objected on the basis that it had not even been established that she had a 1998 injury.

[136] At question 178 the plaintiff was asked whether her back felt the same one year before the November, 2003, accident as it had felt one year after the February, 1998, accident and again this was objected to as the

position was taken that the questions had to relate to the November, 2003, accident.

[137] At question 201 the plaintiff was asked whether she could relate the back problems she had one year prior to the November, 2003, accident to any previous injuries she may have sustained and that was objected to.

[138] At question 233 the plaintiff was asked whether she had back problems from February, 1998, to November, 2003, and Mr. Elgee objected on the basis that the question was too vague and he did not understand the question.

[139] At question 252 the plaintiff was asked whether she was in a position based on records that she had, privileged or not, to advise as to the amount of time she missed from work as a result of the November 16, 2003, accident. Mr. Elgee objected to the privileged document part of the question but not to the non-privileged documents part. Mr. Pettit then asked for particulars of the plaintiff's claims for past income loss to date and Mr. Elgee said he would take that under advisement.

[140] At question 262 the plaintiff was asked what documents she reviewed in preparation for the examination for discovery and again Mr. Elgee objected on the basis that Mr. Pettit had to distinguish between privileged and non-privileged documents.

[141] At question 267 Mr. Pettit asked the plaintiff to inform herself as to what documents she reviewed in preparation for the examination and Mr. Elgee took the position that was a totally improper question that would be taken under advisement.

[142] Again Mr. Pettit asked the plaintiff to inform herself of the amount of past income loss she suffered as a result of the November 16, 2003, accident to date.

[143] At question 268 the plaintiff was asked whether she had any idea how much money she was out of pocket as a result of the accident and Mr. Elgee objected on the basis that she said she did not know. At question 258 the plaintiff then answered that she thought she had missed three to four months of work but she did not know for sure.

[144] At question 324 the plaintiff was asked for her residential address and she answered, "I'd prefer not to say." Mr. Elgee objected on the basis that she did not want to answer simply because she says she is a very private person and that he would take it under advisement.

[145] At question 325 the plaintiff was asked who she lived with and Mr. Elgee objected to that question as well. He also objected to the question at 326 as to whereabouts roughly in Vancouver she lived and at 327 whether she lived with anybody else or alone. At question 328 she was asked why she was concerned about disclosing her residence but that was objected to as well as was the question at 329 as to how long she had lived at her present residence.

[146] Mr. Pettit explained on the record that he was relying on Rule 27(22) for the names and addresses of all persons who reasonably might have knowledge relating to any matter in question in the action, and if Ms Ross lived with others they might be witnesses as to her physical condition and thereby be in a position to give evidence as to the nature and severity of her symptoms. Mr. Elgee took his position under advisement.

[147] At question 336 – 338 the plaintiff was asked whether she filed taxes, kept her tax returns and had them at home and she answered, "Yes" to all three questions.

[148] At question 339 she was asked whether she gave copies or originals of her tax returns to her lawyers and her answer was, "No." When asked at question 340, "Why not?", Mr. Elgee objected as that was a communication between the lawyer and client.

[149] At question 343 the plaintiff was asked what efforts she had made to disclose her documents in the lawsuit and Mr. Elgee objected to that question.

[150] At question 344 she was asked to identify if all the documents in her list of documents were all the documents in her possession and control and Mr. Elgee took the position that was too broad a question.

[151] At question 346 the plaintiff was asked why she had not disclosed the existence of her diary and the answer given was, "Because its privileged." At question 347 she was then asked why it was not listed under the privileged portion of the list of documents and Mr. Elgee objected on the basis that was not a fair question as it was a legal issue.

[152] At question 348 the plaintiff was asked why her tax return was not on her list of documents and Mr. Elgee objected on the basis that the list was a document produced by plaintiff's counsel.

[153] At question 349 Mr. Pettit repeated his question as to what efforts the plaintiff had made to ensure that her list of documents was accurate and complete and Mr. Elgee objected to that question.

[154] At question 350 the plaintiff was asked what documents she had in her possession and control that related to the issues in this action and Mr. Elgee objected on the basis that it was too general a question, was vague and not a fair question.

[155] At question 353 the plaintiff was asked if she was in a relationship at that time and Mr. Elgee objected.

[156] At question 354 the plaintiff was asked who were her closest friends and Mr. Elgee objected.

[157] At question 355 the plaintiff was asked to identify witnesses other than doctors or medical practitioners or therapists who would have some insight into the nature and severity of the injuries she says she suffered from the November, 2003, accident. That was also objected to.

[158] At question 356 she was asked who the co-workers were in the office where she worked and Mr. Elgee objected to that. When Mr. Pettit explained that these co-workers might have some insight as to the effect the plaintiff's injuries had on her ability to do her job Mr. Elgee objected on the basis that it was not relevant.

[159] At question 358 and 359 Mr. Pettit asked who were her co-workers at another office and again Mr. Elgee objected.

[160] At question 396 the plaintiff was asked where her parents live and at question 397 when she stopped living with her parents and Mr. Elgee objected.

[161] At question 458 the plaintiff confirmed that she had been trying to help a friend paint a house and at question 459 that she cannot do anything above her head. At question 460 she explained that she helped paint the outside of a friend's house and a couple of weeks prior had gone over to help a friend paint the inside of the house, these being different friends.

[162] When asked at question 464 who the friend was she gave the name "Sasha" and at question 466 the last name "Berger".

[163] At question 468 she was asked where the house was and Mr. Elgee objected on the basis that was not relevant.

[164] At question 472 she was asked who the friend was whose house she helped paint on the inside a couple of weeks prior and she explained that it was Sasha's father. At question 473 when she was asked what the father's name was Mr. Elgee objected as Mr. Pettit already had Sasha's name.

[165] At question 478 the plaintiff was asked whether there were any other recreational activities she engaged in and she answered, "I tried snow shoeing for the first time."

[166] At question 484 when she was asked who she snow shoed with that was objected to on the basis that it was not relevant.

[167] Mr. Pettit submits all these questions are relevant and should be answered.

[168] Mr. Spraggs supports every objection that Mr. Elgee made on the examination. In his view all of the questions objected to were improper questions as being vague and unclear or too broad and without any foundation laid. In his view Mr. Pettit should be required to ask specifically questions of injuries related to the November, 2003, accident and based on the answer proceed further back in time from there.

[169] By way of example Mr. Spraggs suggests that the initial question should have been whether the plaintiff had any health problems immediately prior to the accident and if her answer was "yes" then it would open the door to a further train of inquiry.

[170] He points specifically to questions such as question 47 which asked whether there was ever an event in the past before November 16, 2003, that lead to a loss of resistance to further injuries on her part, and he supports the objection made that this is too broad a question.

[171] With respect to question 55 as to whether the plaintiff had ever made an ICBC claim before the accident Mr. Spraggs submits that this is irrelevant to the pleadings but the defendant can explore pre-existing injuries to the extent that they are impacted by the present allegations of injury in the November, 2003, accident.

[172] He submits that question 60 of whether the plaintiff ever recovered from injuries suffered in the February, 1998, accident is again a broad question and the question should be initially restricted to the plaintiff's condition just prior to the November, 2003, accident. In his view this was a very inefficient way of questioning.

[173] His submission is that the plaintiff is not claiming for aggravation of pre-existing injuries by her pleadings but if she did it would be completely different.

[174] He also supports the objection to question 63 as to whether the plaintiff made any allegations of permanent injury when she hired Mr. Spraggs to represent her in relation to the February, 1998, accident claim as intruding on areas of privilege.

[175] He supports the objections related to whether the plaintiff ever made a WCB claim prior to November 16, 2003, or ever suffered conditions prior to that accident that would tend to affect her ability to earn income as also being too broad in scope.

[176] He supports the objections made as to the plaintiff's failure to indicate the names of witnesses, etc. as in his submission these involve privacy issues as well and no foundation has been made to suggest that they might have any material knowledge with respect to the claim.

[177] He submits that the plaintiff should not be required to answer further questions relating to her loss of ability to do household chores because no objection was made to that line of questioning and yet there was no follow-up questioning by Mr. Pettit at the time.

[178] Mr. Spraggs' general submissions deal with the alleged conduct of Mr. Pettit on the examination for discovery and what he alleges to be the improper purpose behind all of Mr. Pettit's applications including his application for personal costs against him personally. I will deal with these allegations on the matter of costs.

Discussion

Questions 47 – 54

[179] Plaintiff's counsel objected to questions as to whether the plaintiff had "ever" suffered the injuries alleged in the statement of claim prior to the November 16, 2003 motor vehicle accident, before starting with questions about a period of time closer to the time of the motor vehicle accident.

[180] I know of no requirement in law that the examiner ask relevant questions in a particular order. Specifically I know of no requirement that the examiner must start with complaints that are shortly before the motor vehicle accident before moving to complaints further back in time. It may be more productive to start the line of questioning with questions closer to the time of the motor vehicle accident, but that all depends upon the answers and that is a choice to be made by the questioner. They are all still relevant questions.

[181] The plaintiff will be ordered to answer these questions as the examiner has posed them.

Questions 55, 57, 59, 60, 62, 65, 66

[182] The plaintiff's injuries from the 1998 accident and whether they were ongoing at the time of the 2003 accident or otherwise affected her injuries from this accident are issues in this action. They are proper questions in this regard and the plaintiff will be ordered to answer them. Question 63 is not proper as it intrudes on solicitor/client privilege.

Questions 67 and 71

[183] Counsel cannot require the examiner to ask his questions in a certain order. The plaintiff will be ordered to

answer these questions of “ever” or at any time before the 2003 accident. Any follow-up questions on these matters may or may not be relevant.

Question 79

[184] The question is proper and the plaintiff will be ordered to answer it. If she does not understand the time frame involved she can say so and it will be further clarified by the examiner.

Question 81

[185] The question cannot be too broad when the question matches the general allegation made in the statement of claim of injury to the head. The plaintiff will answer this question.

Question 92

[186] The plaintiff will answer this question and all other questions dealing with prior similar injuries that “ever” occurred.

Questions 95-98

[187] The plaintiff said she did not recall if she had any neck problems six months prior to the 2003 accident. The objection to the question that anything was possible was a proper objection.

Question 104

[188] Again, back problems anytime prior to the 2003 accident are relevant, the degree of that relevance is to be determined after the examination for discovery. The plaintiff will answer this question.

Question 165

[189] The plaintiff will inform herself and answer the question.

Question 167 and 178

[190] The plaintiff will answer these questions as the 1998 accident and the injuries suffered in it are relevant for examination purposes.

Question 201

[191] This is clearly relevant if the plaintiff can relate the back problem to a previous injury. The plaintiff will be ordered to answer this question.

Question 233

[192] The plaintiff is ordered to answer this question as it is not too vague.

Question 252

[193] The plaintiff is obliged to look at any source for the information on her past wage loss claim. The question did not ask for the production of any privileged document for the plaintiff's evidence of her time off work.

[194] In any event the plaintiff has already been ordered to provide particulars to date of her past wage loss prior to any further examination.

Questions 262 and 267

[195] It is a proper question to ask the plaintiff what documents she has reviewed in preparation for her examination, to determine what documents may be relevant to the issues, privileged or not, that have not been included in her list. The plaintiff is ordered to answer this question.

Question 268

[196] This question can be answered through the particulars ordered.

Question 324

[197] At question 321 the plaintiff said she left one job for another because she felt uncomfortable driving to work and the new job was closer to home.

[198] However she refused to answer where she lived in Vancouver for privacy reasons.

[199] The plaintiff will give her residential address. It may be relevant to her evidence of her difficulty driving to work and any privacy concerns can be protected by the implied undertaking that exists not to use any discovery evidence outside of the lawsuit.

Questions 325, 326, 327, 329

[200] These questions are all relevant to the issue of what witnesses there might be to the plaintiff's injuries and their effect on her as well as any income loss she claims. The plaintiff's privacy can be protected by the implied undertaking.

[201] The plaintiff will answer these questions.

Question 339

[202] This question is irrelevant, especially in view of the order to include her tax returns in a supplementary list of documents.

Question 343

[203] This question is irrelevant as regardless of her efforts, her obligation is to produce a proper list of documents.

Question 344

[204] This is covered in the order for a supplementary list and affidavit.

Question 346-349

[205] These are not proper questions for an examination for discovery as they do not go to the issues in the lawsuit, but rather to procedural matters.

Question 350

[206] This is covered in the order for a supplementary list and affidavit.

Question 353

[207] In my view this question as worded is too intrusive.

Question 354

[208] This question is more appropriate to determine potential witnesses and the plaintiff will be ordered to answer it.

Question 355-359

[209] The plaintiff will answer these questions as relevant.

Question 396 and 397

[210] The plaintiff's parents might normally be expected to have some material evidence to give on the plaintiff's injuries and their effect on her. The plaintiff will answer these questions.

Question 468 and 473

[211] The plaintiff will answer these questions as to where the house is and who lived there as these are relevant to her claim for damages.

Question 484

[212] Who the plaintiff snow shoed with is relevant to the issue of material witnesses. The plaintiff will answer this question.

[213] I reject the plaintiff's submission that any further attendance by her would constitute a second examination for discovery by the defendant. I consider that a further attendance will be a continuation of her examination already conducted with defence counsel entitled to answers to the questions I have ordered answered, and the right to continue the plaintiff's examination generally.

Costs

[214] Mr. Pettit seeks costs of these motions in any event of the cause assessed on a lump sum basis of $2,000 per motion, payable by the plaintiff, or in the alternative at the court's discretion, by Mr. Spraggs personally.

[215] He emphasizes that the defence does not seek special costs and does not initially seek a costs order against Mr. Spraggs, but only as an alternative submission. He says the defence is indifferent as to who pays between the plaintiff and Mr. Spraggs.

[216] He puts the basis for his motion for costs against the plaintiff as follows:

a) If he is successful on his motion with respect to the plaintiff's list of documents he should succeed in costs for the studied refusal to provide the necessary documents.

b) If he is successful on his motion for particulars, he is entitled to costs.

c) He seeks costs for the failure of the plaintiff to cooperate in signing authorizations for production of third party documents, requiring his applications for these documents.

d) He seeks costs for the plaintiff's failure to give proper examination for discovery and answer the many questions objected to at the time.

[217] In his alternative application for costs against Mr. Spraggs personally he relies upon Rule 57(37)(c) of the ***Rules of Court*** and does not rely upon any authority of the court to award costs for contempt like behaviour or to award special costs.

[218] It is his submission that the threshold for an award of special costs against a solicitor personally is much higher than an award for ordinary costs against a solicitor personally under Rule 57(37)(c). He submits that while orders for ordinary costs against counsel should only be made sparingly and only in clear cases and only where the purpose is to compensate the litigant and not punish the solicitor, and only where the threshold of misconduct is higher than mere failure in litigation or mere error in judgment or even negligence, here the threshold was met by a failure on the part of Mr. Spraggs to fulfill his duty to the court and to realise his duty to aid in promoting his own sphere in the cause of justice, described as a serious dereliction of duty. It is submitted that it is only necessary to show that the solicitor has caused costs to be incurred without reasonable cause or has caused costs to be wasted through delay, neglect or some other fault, as the rule states.

[219] He submits that the following circumstances could justifiably support an award of ordinary costs against Mr. Spraggs personally:

a) Mr. Spraggs failure to meet his obligation under Rule 26 to ensure that his client complies with the requirements of Rule 26 in production of her documents. Here he submits that the plaintiff has clearly resisted making production of relevant documents and there is not a wit of evidence that Mr. Spraggs has taken any step to supervise his client in this respect.

He also submits that being her counsel in relation to her 1998 motor vehicle claim, he has not produced any records from his own files with respect to that claim that are not privileged.

b) Mr. Spraggs has refused to produce particulars of past wage loss claim and special damages and it is submitted that there was no reasonable basis for his refusal to do so.

c) He submits that the plaintiff has failed to give a proper examination for discovery on the advice of Mr. Spraggs' agent, Mr. Elgee, and Mr. Spraggs as counsel of record should take responsibility for the actions of Mr. Elgee. Further Mr. Spraggs has sought to uphold Mr. Elgee's objections and in fact has gone on to allege misconduct at the examination by defence counsel.

d) He submits that Mr. Spraggs should have complied with his request for execution of authorizations by his client for production of the third party records, rather than requiring any court order at all, whether that be by consent desk order using the ***Taber v. Fritz*** procedure, or in chambers.

He also submits that Mr. Spraggs should have agreed to authorization production of the third party medical records, save for Dr. Sam's records, by the ***Jones*** format, rather than as Mr. Spraggs had insisted by the ***Halliday*** format, well before Mr. Spraggs finally consented to the ***Jones*** form of order by his outline of October 4, 2006.

With respect to Dr. Sam's records, Mr. Pettit points out that he agreed in his first motion that these records should go to Mr. Spraggs initially under the ***Halliday*** format but Mr. Spraggs initial response was to object to this order entirely and then in his subsequent amended response to take no opposition. This was followed by Mr. Spraggs outline of October 4, 2006 where he sought 21 days for editing and production of Dr. Sam's records rather than as had been applied for "forthwith". Mr. Pettit says this is acceptable to the defence.

However, Mr. Pettit's point is that he initially requested Dr. Sam's records on August 10, 2005 through

> authorizations and had Mr. Spraggs consented at that time then production of Dr. Sam's records and any necessary review and editing of those records by Mr. Spraggs could have occurred long before his application.

[220] Mr. Roberts, counsel for Mr. Spraggs, submits that the standard of conduct of Mr. Spraggs that would require an order for personal costs against him must be very serious misconduct, reprehensible misconduct, amounting to an abuse of the process of the court, and not merely a mistake, error in judgment or even negligence. He relies upon ***Ahlgren (Guardian ad litem of) v. Guildford Cab Ltd.***, [2000] B.C.J. 2334, quoting from ***Hannigan v. Ikon Office Solutions Inc.*** (1998), 61 B.C.L.R. (3d) 270 (B.C.C.A.).

[221] He points out that the object of such an order is not to punish the solicitor but to compensate the opposite party, although the order itself does have a deterrent element to it.

[222] He submits that Mr. Spraggs has not met this standard of misconduct.

[223] He submits that Mr. Spraggs cannot be responsible for the failure of the plaintiff to disclose her full tax returns on her list of documents when she has deposed in her affidavit that she believes they are embarrassing and not relevant to the action, and she wishes to protect and maintain her privacy and confidentiality.

[224] In any event, he submits that her tax summaries have been produced and they should be sufficient to disclose all relevant information.

[225] He as well submits that the defendants could have easily made and can make a third party application against Revenue Canada directly for the plaintiff's returns.

[226] He submits that other than the tax returns and the plaintiff's diary there is no evidence of any other documents that the plaintiff may have that should have been disclosed, or that she did have in the past that she should have disclosed as having had.

[227] Once again, he submits that in any event these issues do not suggest serious reprehensible conduct on the part of Mr. Spraggs.

[228] In fact he submits that Mr. Pettit's conduct has been no better than Mr. Spraggs' conduct throughout and that it was Mr. Pettit who precipitated the war on words in his opening letter to Mr. Spraggs of July 20, 2005 when he notified Mr. Spraggs that he required strict compliance with Rule 26, that he intended to talk directly to the plaintiff's treating physicians and that he required proof of the authenticity of any third party documents produced through Mr. Spraggs' office.

[229] Mr. Roberts submits that this was an aggressive and uncooperative attitude displayed by Mr. Pettit that amounted to a threat and an attempt to intimidate Mr. Spraggs.

Discussion

a) Rule 26 documents

[230] ***Boxer v. Reesor*** (1983), 43 B.C.L.R. 352, a decision of Chief Justice McEachern, sets out the responsibility of a solicitor in the preparation of his client's list of documents. He said at p. 357:

> The responsibility of a solicitor in connection with the preparation of a list of documents has often been stated. I regard the following extract from The Conduct of Civil Litigation in British Columbia, Fraser & Horn, 1978, vol. 1, pp. 276-277, to be an accurate statement of the law except that in this province we do not require an order for production and lists of documents are no longer verified by affidavit:
>
> "Nowhere in civil procedure is the responsibility of the lawyer greater than in the area of discovery of documents.
>
> This is partly because the lawyer's concept of relevancy is ordinarily more extensive than that of the client. It seems rarely to occur to a litigant that such things as cancelled cheques, receipts, birthday

> cards, telephone bills and the like might have a bearing on the case. A kind of documentation which a client notoriously fails to produce, unless specifically asked to do so by his lawyer, is the interoffice memo, sometimes a rich and critical source of information.
>
> Additionally, the litigant, owing no special duty of loyalty to the integrity of the judicial system, may be unenthusiastic about disclosing the existence of documents harmful to his case. As an officer of the Court, the lawyer has the responsibility to police the conscience of his client in this area.
>
> The process of discovery of documents tends to pinch most, as one might expect, where the party from whom discovery is sought has numerous records to go through. The task of persuading a client to undertake this duty faithfully can be considerable.
>
> Careful attention should be paid to - and the client questioned about - documents which have, either innocently or corruptly, passed out of his possession, by destruction or otherwise.
>
> The lawyer's duty was canvassed in the House of Lords, where Lord Wright put the matter as follows:
>
> > 'The order of discovery requires the client to give information in writing and on oath of all documents which are to have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to.' (Myers v. Elman, [1940] A.C. 282, at 322)"

[231] I agree with Mr. Pettit that there is no evidence Mr. Spraggs met any of these responsibilities in the preparation of his client's list of documents. Instead of recognizing the deficiency of his first list and providing an amended list or supplementary list when it was obvious one was needed, he has continued to attempt to defend the completeness of the first list of documents.

[232] At the beginning, on July 20, 2005, Mr. Pettit advised Mr. Spraggs by letter that he required a complete list of documents to include medical and employment related documents. He also required the documents over which privilege was being claimed to be specifically enumerated.

[233] I do not consider that Mr. Pettit's letter was threatening or displayed any uncooperative attitude. Whether Mr. Pettit had any personal experience with Mr. Spraggs' policies beforehand or his client had had personal experiences, he was entitled to tell Mr. Spraggs what he expected of his client by way of a list of documents according to the rules.

[234] Mr. Spraggs told Mr. Pettit in his letter of August 16, 2005, that he would govern the litigation in accordance with the ***Rules of Court*** as he expected Mr. Pettit to do, and instead he made no effort to amend or supplement his original list of documents produced on May 10, 2005.

[235] It may oftentimes be the case that a counsel does not know exactly the breadth of relevant documents that his client might have, but that is the very reason for the investigation set out by Chief Justice McEachern in ***Boxer***.

[236] Here the plaintiff always did have her income tax returns, was keeping a diary, and had been involved in a previous motor vehicle accident in 1998 where she had complained of some of the same injuries, and had made this claim through Mr. Spraggs' office.

[237] Mr. Spraggs knew from Mr. Pettit's statement of defence filed May 9, 2005, that his client's physical

condition at the time of the 2003 accident was in issue and that her medical condition pre-accident would be relevant and yet no effort was made to disclose any pre-accident medical records.

[238] I reject the submission on behalf of Mr. Spraggs that the tax summaries were good enough or that the defendants should have applied to Revenue Canada.

[239] The defendants will be entitled to their costs of this application from the plaintiff. I assess those costs in the amount of $1,000.

[240] I have no doubt that it was Mr. Spraggs who decided what would go in the inadequate list of documents that was served and what would not go in, and that it was not the plaintiff's decision. It was also Mr. Spraggs decision to refuse to supplement the list voluntarily when he must have known it was completely deficient.

[241] I order that he be personally liable for $500 of these costs in accordance with Rule 57(41).

[242] It follows that Mr. Spraggs is not entitled to any costs for this sum from the defendants or Mr. Pettit.

b) Particulars of past wage loss and special damages

[243] Mr. Spraggs included a paragraph in his statement of claim indicating that particulars of special damages would be provided upon request. Nevertheless he continued to deny any request or order for these particulars until I have ordered them now. That was a completely unmeritorious position for him to take.

[244] He also opposed any particulars of past wage loss even when his client confirmed on her examination for discovery that she could not provide any meaningful particulars. That was an unmeritorious submission to make as well.

[245] This application did not really add to the overall costs and the costs ordered for the Rule 26 application will cover the defendants costs for this application as well.

c) Objections on examination for discovery

[246] The vast majority of objections made on the examination for discovery were of no merit whatsoever, but I am unable to assign any personal fault to Mr. Spraggs for that. Mr. Elgee was a lawyer at the time, and not a mere clerk, and it is unknown to me whether he was applying an overall policy of Mr. Spraggs' office, or was making his own decisions on the questions to be objected to.

[247] While the defence is entitled to costs of this application they cannot be against Mr. Spraggs personally. The defence will have its costs against the plaintiff which will also be assessed in the amount of $1,000. If the plaintiff has any objection to being personally responsible for these costs, she can deal with Mr. Spraggs office on that issue under Rule 57(37)(b). Again, I see no reason to award any costs against the defendants or Mr. Pettit for the application.

d) Third party documents

[248] In his letter of August 12, 2005, Mr. Spraggs set out his policy that he required production of medical records by court order in ***Halliday*** format according to ***Taber v. Fritz*** procedure, that authorizations were not appropriate, that any medical records pre-accident would not be produced, and that he should get his costs.

[249] He relied upon the comments of Master Brine (as he then was) in ***Dowell v. Glemnitz et al***, October 19, 2001 New Westminster, S062984, where Master Brine suggested that the records of a family physician should be produced by ***Halliday*** format because of concerns over issues of privacy and relevance.

[250] Mr. Spraggs suggested in his letter that this was a clear message from the court that the law required medical reports to be produced by a court order in ***Halliday*** format and that this was the reason for his practise.

[251] In my view Master Brine was clearly only dealing with the records of the family physician and in no way could his comments be taken as supporting an overall policy of all orders for third party medical reports being

required in ***Halliday*** format.

[252] Mr. Spraggs initially opposed authorizations because of stated concerns over delays in getting the client to sign and problems getting physicians to comply. He also submits that the plaintiff is not obliged by law to sign authorizations.

[253] However this position was coupled with a demand by Mr. Spraggs for receipt of third party documents by court order in ***Halliday*** format and payment of his costs.

[254] It was only in his amended response and outline of October 4, 2006, that Mr. Spraggs agreed to a ***Jones*** form of order for all third party documents, except for Dr. Sam's records.

[255] In fact Authorizations can be ordered by the court (***Lewis v. Faye et al*** 2007 B.C.S.C. 89).

[256] However, I am not prepared to penalize Mr. Spraggs for not agreeing to authorizations. I accept that some physicians might ignore authorizations where they would not ignore court orders. In my view, a ***Taber v. Fritz*** form of order would have been as easy to prepare and effective to obtain a court order without a court appearance.

[257] However, Mr. Spraggs should never have insisted on a ***Halliday*** form of ***Taber v. Fritz*** order as well as his costs before he put the defendants to the task of preparing their motion material, before changing his position to agree to a ***Jones*** form of order.

[258] I have no doubt that Mr. Spraggs saw the handwriting on the wall, but by then he had already put the defendants to the expense of the motion.

[259] In addition Mr. Spraggs initially refused any production of MSP printout for more than six months pre-accident. It was only in his amended response and outline that he consented to the MSP printout for the plaintiff being produced to the solicitor for the defendants for the period from February 20, 1998 to the present.

[260] In view of my decision that the plaintiff's injuries from the February 20, 1998 motor vehicle accident have always been relevant to her claim in this accident, this concession in my view should have been made initially.

[261] Mr. Spraggs did withdraw his opposition to the third party documents by ***Jones*** format in his amended response which was served on May 1, 2006. However he did not formally consent to the third party medical records by this format, save for Dr. Sam's records, until his outline on October 4, 2006.

[262] After October 4, 2006 it should have been quite easy and very efficient to prepare ***Taber v. Fritz*** consent orders that would have avoided the necessity of coming to court on this issue.

[263] I am prepared to order costs to the defendants for this motion up to October 4, 2006 in the amount of $400. As this application was included together with the application for Rule 26 documents, for which I have already assessed $500 costs against Mr. Spraggs, and both are part of one notice of motion or interlocutory application, he will not be obliged to pay any further costs personally for this application."

"The Honourable Mr. Justice Truscott"

November 9, 2007 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that paragraph 261 and 262 of the reasons for judgment of September 14, 2007 are deleted as they refer to a different Mr. Spraggs.

In paragraph 241 of the reasons for judgment the final sentence is deleted and replaced with the following: "I order that he be personally liable for $500 of these costs in accordance with Rule 57(41)."

In paragraph 265 of the reasons for judgment the final sentence is deleted and replaced with the following: "As this application was included together with the application for Rule 26 documents, for which I have already assessed $500 costs against Mr. Spraggs, and both are part of one notice of motion or interlocutory application, he will not be obliged to pay any further costs personally for this application."