Date: 19961122
Docket: B916799
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JANET CARROLL AND MURDO THOMPSON

PLAINTIFF

AND:

BEV PASSANT

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE T.M. McEWAN

Counsel for the Plaintiff: Karen Thompson

Counsel for the Defendant: Timothy H. Pettit

Place and Date of Hearing: Vancouver, B.C.
November 7, 1996

[1] By Notice of Appeal entered July 8, 1996 the defendant seeks to reverse the Order of a Master made June 26, 1996.

[2] The application before the Master was for full production of certain documents which the plaintiff's solicitor had identified as irrelevant following a "Halliday" Order made by Master Barber on January 12, 1996. On July 8, 1996 the Master inspected the

disputed documents pursuant to Rule 26(12). He ordered production of certain employment records but declined to order production of portions of one of the physicians' medical records. It is this ruling that is appealed.

[3] By way of background the plaintiffs' claims arise out of two motor vehicle accidents in which she alleged she suffered the following injuries (from the Statement of Claim):
(a) headaches;
(b) blurred vision;
(c) dizziness;
(d) impaired fine motor control;
(e) nausea and upset stomach;
(f) injuries to:
    (i) back
    (ii) neck
    (iii) shoulders
(h) difficulty sleeping;
(i) tension;
(j) anxiety;
(k) depression;
as a result of which the Plaintiff continues to undergo treatment and is under the care of physicians.

[4] Although the pleadings have not, to date, been amended plaintiffs' counsel says there will be no claim for "stress-related" matters after 1990.

[5] Counsel for the plaintiff submitted on the authority of Merth v. Merth 18 C.P.C. (3d) 361 (among other authorities) that the latitude of this court when sitting on appeal of a Master's interlocutory order is limited. I accept that the test is that the Master must be "clearly wrong" before I can interfere with such an Order.

[6] Counsel for the defendant urges that the order was clearly wrong on the following grounds (from the Notice of Appeal):
1. That the presently undisclosed records of Dr. Rev may contain information relevant to the issue at hand, specifically, the Plaintiff's physical injuries, emotional and psychological claims and pecuniary claims, past and prospective;

2. Master Patterson based his decision on the Plaintiff's concession that her claims for tension, stress and anxiety were limited to the period 1987 - early 1990. In light of the Plaintiff's claim for general pain and suffering, this concession is immaterial and should not have formed a basis of the Master's reasons;

3. At present, the Plaintiff has made production of

only fragments of Dr. Rev's records. These fragments are barely comprehensible without further production. Master Patterson should have ordered sufficient production of Dr. Rev's presently undisclosed records to make the relevant fragments comprehensible; and,

4. Dr. Rev's records consist of 103 pages. Most of these pages consist of consult reports, test results, etc... The remainder of these pages consist of Dr. Rev's handwritten notes regarding the Plaintiff. At the hearing of this matter on June 6, 1996, Master Patterson undertook to review only the handwritten portion of Dr. Rev's notes and declined to review the bulk of Dr. Rev's records. The Defendant respectfully submits that this is a mistake in law.

[7] The plaintiffs resists production of the records, not on grounds of privilege, but on the grounds that the documents are not relevant to the issues raised in the pleadings. She submits that the issue of relevance must always be weighed against the privacy concerns of the plaintiff. In support of this proposition she cites M.(A). v. Ryan (1994) 98 B.C.L.R. 1 (C.A.) per Southin, J.A. at p. 19:
In considering whether to make an order compelling disclosure of private documents, whether in possession of a party or a non-party, the Court ought to ask itself whether the particular invasion of privacy is necessary to the proper administration of justice and, if so, whether some terms are appropriate to limit that invasion. There need not be a privilege against testimony in the classic sense for this to be a relevant question. By "private documents" I mean documents which are not public documents. I do not limit this question to what might be thought of as personally embarrassing documents.

On the one hand, a person who has been injured by the tort or breach of fiduciary duty of another ought not to be driven from the judgment seat by fear of unwarranted disclosure - a sort of blackmail by legal process. If such a thing were to happen, the injured person would be twice a victim.

But, on the other hand, a defendant ought not to be deprived of an assessment of the loss he actually caused, founded on all relevant evidence. It would be as much a miscarriage of justice for him to be ordered to pay a million dollars when, if all the relevant evidence were before the court, the award would be for one-tenth that sum, as it would be for the injured person to feel compelled to retire from the field of battle because of a demand for documents containing intensely personal matters of little relevance.

There is no perfect balance to be struck between these competing considerations in this or any other case.

[8] The defendant argues that the essential legal principles are as set out in Campbell v. Rorison (unreported) 1992 (B.C.S.C.) No. 90S 2493 Duncan Registry (per Master McCallum). The Law in respect of this matter is reasonably clear Halliday v. McCulloch (1986) 1 B.C.L.R. (2d) 194. The court there acknowledged one of the grounds for nondisclosure of medical records was relevance.

The test of relevance is set out in Dufault v. Stevens (1978) 6 B.C.L.R. 199 (B.C.C.A.), where the court said:

"The comments of Brett L.J. in Cie Financiere du Pacifique v. Peruvian Guano Co. (1882), 11 Q.B.D. 55 at 63 (C.A.), as to what constitutes a document relating to a matter in question have been quoted by this court on several occasions.

'It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences'.

It follows from this that an applicant need not show that a document is admissible in evidence at the trial as the condition of his obtaining an order under this rule. If a party seeking the order is able to satisfy the judge that the document, or information in a document, may relate to a matter in issue, the judge should make the order unless there are compelling reasons why he should not make it, e.g., the document is privileged or "grounds exist for refusing the application in the interest of person, not parties to the action, who might be embarrassed or affected adversely by an order for production" (per McFarlane J.A. in Rhoades v. Occidental Life Ins. Co. of California, supra, at p. 630), including the custodian of the document".

It seems to me that the test is necessarily therefore a broad one and it is to some extent subjective. It is

difficult for me to put myself in the shoes of counsel for the defendant to decide what information "may - not which must - either directly or indirectly enable" the defendant to advance his case.

I have reviewed the material which was not produced by the plaintiff. Much of it is, to a lay person's eye, unintelligible. Much of the information refers to conditions which, on the surface, appear unrelated to the plaintiff's current complaints. That said, the net of relevance is case very widely and the pleadings are similarly cast very widely. With that in mind it appears to me that the defendant, with the aid of counsel's medical advisors, is in a far better position to make a realistic assessment of the relevance of these documents than am I.

Given the nature of this material it appears to me that all of the documents ought to be produced to the defendant. There are some records which, on almost any test, must be irrelevant. Those records are also quite inoffensive from any point of view as well and I see no harm in ordering them produced to the defendant. At the end of the day the defendant must persuade the trial judge as to the issue of relevance. At this stage of the proceedings given the nature of this material it appears to me inappropriate to refuse to disclose the material.

All of the material which is not privileged in the true sense of the word, ought to be disclosed to the defendant.

[9] The records concerned here are those of a doctor who has seen the plaintiff since the accidents for what has been described as "well women's care (i.e. pap tests, pregnancy and post partum care, etc.)." The doctor has not specifically treated the plaintiff for accident-related injuries. The defendant claims that, nevertheless, they may contain information relevant to the issues in the lawsuit. He submits that the abandonment of "stress related" claims "after 1990" does not put these documents beyond purview, in that a general claim for pain and suffering such as the plaintiff advances in this action may still give rise to a concern about what is, and is not, accident related and whether, or to what extent, there are complicating physical or psychological factors at play.

[10] I am of the view that, while relevance is a matter that may be considered by a Judge or Master in chambers on an application under Rule 26(12) (See Halliday v. McCulloch (9186) 1 B.C.L.R. (2d) 194), such a determination should be made only in the clearest circumstances where the documents under consideration are medical records or documents of a similar nature. I say this for the reasons articulated by Anderson, J. (as he then was) in

Langlois v. Ordorfer and Ordorfer 6 B.C.L.R. 260 at 262:
Counsel for the plaintiff consents to an order for production of the medical records of Dr. Hanna relating to the injuries referred to in paras. 4, 5 and 6 of the affidavit of T.L. Robertson, but objects to the production of any other medical records. He objects, for example, to any medical records which may relate to prior emotional disorders or matters of this sort. He says that his client would be prejudiced by the release of this confidential material. He further says that there is no evidence before the court that the additional medical records are relevant to the plaintiff's claim for damages.

I do not think it is open to the plaintiff to take this position. The claim for damages relates to injuries which are often related to emotional factors and pre-existing emotional factors, and the defendants, therefore, have the right to peruse all the plaintiff's medical records in order to properly assess the plaintiff's claim and to prepare for trial.

While it may be that material that is otherwise confidential may be disclosed to counsel for the defendants and his medical advisors, this is one of the risks taken by the plaintiff when he commences action. In practice, however, if the medical records turn out in whole or in part to be irrelevant, the disclosure of the confidential information will be a limited disclosure, namely, to counsel for the defendants and his medical advisors. The information disclosed will go no further. The plaintiff cannot, of course, object to disclosures in open court if the information turns out to be relevant to the claim for damages.

Counsel for the plaintiff suggests that R. 26(12) is applicable and that the court can review the medical records to determine if they are relevant. In my view, the relevance of the medical records cannot as a general rule be determined until the plaintiff has given evidence in chief and undergone cross-examination. Relevance will depend on the view taken by the court of the plaintiff's evidence in the light of all other evidence, including expert testimony, as related to the claim for damages. In any event, the court could not, in many cases, determine the relevance of the medical records without expert assistance and, therefore, the very purpose sought to be achieved by not producing the documents in the first instance would be defeated.

I point out, as well, that the course suggested by counsel for the plaintiff would result in great expense to the litigants and inconvenience to the medical

profession.

[ITALICS MINE]

[11] It is my view that in proceeding as he did and finding, that because the plaintiff had undertaken to raise no stress-related factors after 1990, "the full medical reports of the doctor should not be disclosed," the Master was clearly in error. The remaining claims still raise issues that, fairly speaking, may have been influenced by other events in the plaintiff's life, including other treatments or apparently unrelated disorders. My reading of the Master's decision suggests that the limitation was crucial to his decision. With the greatest respect I am unable to see how a judgment respecting relevance could confidently be made without expert assistance at this stage of the proceedings. It requires, in effect, a medical judgment.

[12] I think it would be most unwise if a practice developed in Chambers of preempting disclosure before a complete profile could be put to medical experts for the party seeking disclosure, because the presiding Master or Judge, applying a lay understanding of medicine, could not then and there see how such matters could be related.

[13] This is not to say that in every case the privacy concerns of the plaintiff are simply answered by noting that she "put her health in issue." I would think that whenever a legitimate privacy concern has been put before the court, it would be incumbent on counsel seeking disclosure to establish a persuasive case for relevance (once the material had been fairly considered) before any attempt was made to use it at trial (see Langlois supra). Viewed in this way, I do not see that the limited disclosure of sensitive material to the defendants' lawyer and medical advisors, can, in general, result in harm that outweighs the interest protected by full disclosure.

[14] Because I have taken this view of the matter, I consider it unnecessary, indeed inappropriate, to review the withheld portions of the records myself. To rule on the basis of such a review would be to compound the mischief I consider to be inherent in a lay assessment of relevance in the circumstances, by substituting my own uninformed views for those of the Master. To do so would transgress the proper function of a Judge sitting in appeal of a Master's interlocutory ruling, in any event.

[15] For the reasons stated herein I reverse the ruling of the Master and order full production of the complete records of Dr. Rev to the defendant at the defendant's expense.

[16] Costs will be in the cause.

T.M. McEWAN, J.

"T.M. McEwan, J."