IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120120
Docket: M104354
Registry: Vancouver

Between:

Denise Gibson

Plaintiff

And:

Randall Frank Zwarn

Defendant

Before: Master Baker

Oral Reasons for Judgment

In Chambers
January 20, 2012

Counsel for the plaintiff:	M.S. Randhawa
Counsel for the defendant:	J.V. Marshall
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** This is an application following on an adjournment of a larger application approximately a week ago, adjourned so that the plaintiff could marshal her resources in order to improve upon the materials. I leave it at that. That is all I know about that adjournment. That left three different items: number one, that she produce the plaintiff's log regarding Rick McCarty's services performed for the plaintiff, and second, the plaintiff's diary for the period October 16, 2009, to present. Finally, the third thing, that the plaintiff shall within 30 days provide particulars of her claim for past income loss.

[2] I understood most of your argument, Ms. Marshall, number three, to be – well, I was thinking about Mr. McCarty's time, but it is beyond that. It is this the business of Stacy's payment, that sort of thing?

[3] MS. MARSHALL: In my view, the issue with Mr. McCarty's services, they could fall under special damages, they could fall under an "in trust" claim, or they could fall under wage loss. In any event, I think those details should be producible.

[4] THE COURT: Thank you. In any event, in respect of the first two items, and these are discretely different, the first two relate to documentary evidence. The claim of litigation privilege is made, and in particular that is based upon the affidavit of Ms. Jorgensen, who says on information and belief from Mr. Randhawa, that Mr. Randhawa on the 27th of October, some I think 11 days after the accident that is the subject of these proceedings, advised the plaintiff to maintain a diary with respect to her injuries.

[5] Nobody has said Mr. Randhawa did not tell or instruct or advise Ms. Gibson to do that. The argument is made, however, that there is an onus upon a party claiming privilege and that, generally speaking, the law, not just the *Rules,* but the law and case authority, lean in – I think was the phrase Ms. Marshall used – favour of disclosure. I think it is beyond that. I think it is the duty of anyone to disclose any relevant information that is not subject to a unique or particular protection at law, such as litigation privilege.

[6] In this case, Ms. Marshall argues that despite those affidavits, because it is in a sense replicated, two affidavits from Ms. Jorgensen, the onus is not met; that out of her own mouth in examinations for discovery, given a reasonable opportunity – that is my phrase; I do not think it is Ms. Marshall's – to explain herself, Ms. Gibson acknowledged keeping these two documents or maintaining them -- a), a diary, and b), a log in respect of Mr. McCarty's services -- when neither had been listed as privileged or otherwise, of course, in any list of documents. As I understand the circumstances, it came as a bit of a surprise at the discovery, although that is not too germane whether it did or did not.

[7] The case most of the Masters rely upon and what is cited so often is Mr. Justice Wood's appellate reasons in *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254, in which he postulated and established the two-stage test: step number 1, at the time a document is created, is or was litigation in reasonable contemplation; step number 2, if that is the case, then was the dominant purpose for the creation of the document litigation, and obviously to assist counsel or to assist the party's case in litigation.

[8] Ms. Marshall says neither of these tests were met. I am inclined to agree with her in respect to the diary for a start. A reasonable reading of Ms. Gibson's own evidence in the discovery leads one to the inference, and that is what I infer, that she had a diary that she maintained up to and at the time of the accident and, I conclude, independent of the accident itself notwithstanding subsequent advice by counsel to keep a diary. She gives evidence in respect of writing down, I conclude, on the day of the accident itself an account of the accident and how her body was knocked around in the accident.

[9] It is evident to me that this diary was not kept, certainly, solely on the instructions of counsel. It is also clear to me that that being the case, she obviously kept the diary for other purposes, i.e., as a record daily events and thoughts and circumstances like anyone else would with any other diary.

[10] She also gave further evidence as to what purpose she had in maintaining the diary. This is a document in which she said it is "an Oprah thing" to record feelings and thoughts, et cetera. Again, at the very least, it tells me there are other purposes other than just recording the obvious or recordable aspects of the consequences of the accident.

[11] I am not persuaded in the circumstances that, skipping right past the first test, the dominant purpose was litigation. Having said that, I should go back to the first test and acknowledge that it is overly simplifying to state it as I did. I think it is of much greater assistance to refer to Madam Justice Wedge's decision in the *Azuma*

Foods v. Versacold Canada Corporation case, 2008 BCSC 643, where at para. 81 she gave a much better than I expression of that first test:

> ... Litigation is in reasonable prospect at the time the document was produced when a reasonable person, possessed of all relevant information including that peculiar to one party or another, would conclude it was unlikely that the claim for loss would be resolved without it.

That, in my view, seems to raise the threshold a little from simply saying it must be in contemplation; that I am talking to a lawyer. Now, lawyers settle many, many cases without commencing litigation. There are not many people to consult in the event of a car accident, other than your medical experts and professionals, obviously, and legal professionals, such as lawyers.

[12] I am not satisfied that the first step of that test is met in respect of the diary, so it will be produced.

[13] In respect of the log, I am also satisfied that Ms. Gibson has not convinced me, nor has anyone on her behalf convinced me, that the dominant purpose was litigation. She clearly had in mind to record the extent of assistance from Mr. McCarty. She clearly had in mind the possibility of making some form of recompense. There is just no question about that in my opinion, but what the recompense would have been, whether it was a log she was maintaining as a kind of contingency that when she recovered from the defendant she would then maintain, as it was discussed here, a kind of "in trust" claim on behalf of Mr. McCarty and advance him some recompense only in the event of recovery, it is just not that clear to me at all. Certainly not clear enough to have met the onus.

[14] Again, I have the same view as to whether or not the first test is even met. I am not satisfied that when the log was being prepared it was reasonably likely that the matter could not be resolved without litigation. I am not satisfied of that.

[15] Now, in the case of both of these documents, that clearly was the case when litigation was commenced some one year after the accident. So the production will be restricted to that time from the accident to the filing of the writ. In both cases I regret I do not know that date exactly, but I am sure you will not have difficulty with that.

[16] Number 3, particulars of past income loss. There was a great deal said about past wage loss. I know neither counsel really intends to restrict us to past wage loss, because her form of income was quite complicated. She received some income for foster care services. Even that group itself is a complicated form of income because people who give foster care receive income under several heads, some of which is reimbursing the expenses, some of which is comfort money, some of which I think is money for services given. It is not that important at this time and does not figure too much.

[17] Ms. Gibson was also giving assistance through the Community Living BC to a disabled adult, and she received some funds directly from Community Living BC. She also by giving room and board, so to speak, to the individual in question received room and board from that person. Whether or not that person is still there is unclear.

[18] The request for particulars is resisted because, as I understand it, it is argued that this information will be essential to the opinion of an expert, and specifically an economist, who will tally up what has happened and give an opinion.

[19] I am referred to Judge Hinkson's decision in *Yousofi v. Phillips*, 2010 BCSC 1178. I am not satisfied that that is authority to deny this request. Many of the requests that were asked for were past and prospective. Loss of earning capacity, loss of opportunity to earn income, loss of housekeeping capacity, past and prospective loss of earnings. So we have got earnings or earning capacity, a substantially more complex question than was being asked, I think, here.

[20] Firstly, the only time period is the past. This should be historic facts. There should be some historic measure of what has been lost. Nobody is asking Ms. Gibson to speculate as to the future.

[21] Secondly, it is a narrower category. She should be able to explain through particulars to assist in either trial preparation or negotiation, I suppose, although we are obviously only concerned today with trial preparation. She should be able to obtain this information, and I cannot see why it should not be offered. So those particulars will be ordered.

[22] I meant to say one other thing in respect of Mr. McCarty in particular and it is this: it is not just a financial question to me. The extent to which Mr. McCarty's assistance was given figures. If I were a trial judge, I would think this will assist in understanding the extent of the disability arising from the accident and how long it went on. If, for example, Mr. McCarty had to help her six hours a week the first three

weeks and then two hours and then one hour and then stop, surely that would be at least one objective measure, one would think, of recovery rate or at least growing capacity on her part. That is all I have to say. We are out of time.

[23] MS. MARSHALL: I just have one question about the timeline for the order for production with the log and the diary. Is the order from the date of the accident to the date of the writ of summons?

[24] THE COURT: Yes.

[25] MS. MARSHALL: Or notice of civil claim, I guess, as it was. And the only other thing I just want to say is that we are seeking costs for today.

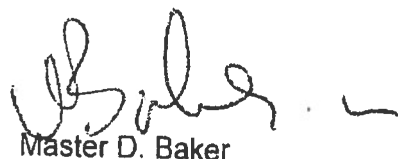
[26] MR. RANDHAWA: Given the issues in this case, my submission would be costs in the cause. Liability hasn't been admitted.

[27] MS. MARSHALL: Liability has been informally admitted and it will be formally admitted. We are just having some difficulty tracking down the defendant.

[28] THE COURT: Well, that always helps, to find the defendant. You are entitled to your costs.

[29] MS. MARSHALL: Thank you.

[30] THE COURT: Thank you.



Master D. Baker