Disclosure Of Medical Records And Privacy Concerns In ICBC Injury Claims

January 7th, 2010

Reasons for judgement were published this week on the BC Supreme Court Website dealing with disclosure of past medical records in the context of an ICBC Injury Claim.

In this week's case (Sidhu v. Dhani) the Plaintiff was involved in a 2006 BC Car Crash and sued for damages. In the course of the lawsuit ICBC asked that the Plaintiff provide all her medical records for 4 years before the car crash. There was evidence that the Plaintiff attended one specific GP 236 times in the years before the collision. The Plaintiff refused to produce these records and ICBC applied to court. At the hearing the Master largely agreed with ICBC and ordered that the medical practitioners who treated the Plaintiff produce all of their records for the 3 years before the car crash directly to ICBC's lawyer.

The Plaintiff appealed arguing that the disclosure should not have been ordered or, in the alternative, that the records should go to the Plaintiff's lawyer first so that clearly irrelevant records could be redacted before sharing the records with ICBC.

On Appeal Mr. Justice Schultes agreed that the the records should be produced but ordered that they be produced with the safeguards the Plaintiff wished.

In coming to this decision Mr. Justice Schultes reasoned as follows:

[8] The learned master ordered the production of the records in what has become known as Jones form, that is, directly to counsel for the third party rather than in so-called Halliday form, in which the plaintiff's counsel would first have the opportunity to review the records and seek to vet out any matters said to be irrelevant or subject to a privilege. The learned master did not provide the reasoning underlying this aspect of his decision…

the master drew the inference that the sheer number of medical visits, including the remarkable number to one doctor, made it likely that the clinical records contained information that would be relevant to the plaintiff's claims. The learned master's reasons, though brief, clearly demonstrate that process of analysis. In particular, the large number of medical visits would be relevant to the plaintiff's claim that the accident had diminished his employment prospects and ability to earn future income by suggesting some other chronic or ongoing difficulties potentially unrelated to the accident.

[13] To make this distinction clear, it appears to me that speculation and so-called fishing expeditions refer to a situation in which the material in support of an application does not give rise to a reasonable inference that material relating to the matter is likely in the hands of the third party. Material relating to the matter is, of course, that which directly or indirectly allows a party to advance his own case or damage that of his adversary's: Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co. (1882), 11 Q.B.D. 55 (C.A.) which is the standard reference on this point.

[14] It follows that I find that the learned master was not clearly wrong in his decision on this aspect of the case and I would therefore dismiss the first part of the appeal…

[15] The plaintiff further argues that even if the learned master was not clearly wrong in ordering disclosure of these records, he erred to that standard in failing to order their disclosure on the so-called Halliday basis, that is, released first to him so that issues of relevancy and privilege could be considered. The source of this basis is the decision ofHalliday v. McCulloch (1986), 1 B.C.L.R. (2d) 194 (C.A.).

[16] The value of the Halliday process is to allow potentially privileged material to be preserved until a proper determination of its status has been made and to allow the plaintiff to delete irrelevant or embarrassing or confidential material, or to make it irrelevant by amending his pleadings before discovery: see Halliday, at pages 199 and 200. The effectiveness of this process, of course, depends on counsel carrying out their duty to disclose relevant material: see Boxer v. Reesor (1983), 43 B.C.L.R. 352 (S.C.). However, as Lambert J.A. pointed out in Halliday any abuse of this method of disputing relevance can be subsequently punished by an order of costs.

[17] On this issue, the plaintiff relies on Grewal v. Hospedales, (2004), 33 B.C.L.R. (4th) 294 (C.A.), and Gibson v. Mian, 2002 BCSC 1836.

[18] In Grewal, the master was found to have erred in failing to consider in a personal injury accident the relevance of the plaintiff's medical records from specialist whose areas of specialty appeared to bear no relationship to the types of claims that the plaintiff was advancing.

[19] In Gibson, the master ordered medical records of the plaintiff's family doctor in Halliday form based on the reasoning that such a doctor is likely to deal with irrelevant issues that could embarrass the plaintiff. This analysis was as applicable, in the master's view, to male plaintiffs as to female plaintiffs. As the master observed:

… in the case of general practitioners, other things being equal, I think that … describing them as the general practitioner with a history of consultations for matters other than the injuries sustained in the accident is enough to meet the necessary standard of lack of relevance and embarrassment.

[20] The Gibson decision, being a decision of a master, is not, strictly speaking, binding on me, but I do find its analysis helpful. While I would not go so far as to say that in all cases the bare assertion that a doctor is a general practitioner who did not treat the injuries complained of as part of the action will justify disclosure on a Halliday format, I do think that it would raise concerns that a court must at least consider and address. In this regard, I disagree with the third party's submission that the Halliday procedure is restricted to circumstances, like those in Grewal, in which the nature of the practitioner's speciality is on its face irrelevant to the issues in the litigation.

[21] Here, the learned master did not provide any analysis explaining his decision to order disclosure in Jones format. While he is deemed to know the law and to have applied it correctly in the absence of some contrary indication, I think it was a clear error for him not to have identified that the same large number of medical visits which had made it likely that these records contained relevant evidence also sharply increased the risk of capturing irrelevant and embarrassing information during the process. This seems to me to be the obvious corollary of his disclosure decision and I cannot infer that he addressed it and resolved it in a manner that justified Jones disclosure in the absence of any indication to that effect.

[22] Accordingly, I will allow the appeal to the extent of ordering that records of the doctors whom the plaintiff asserted did not treat him for any matters related to the accident that is the subject matter of this litigation will be disclosed in accordance with the procedure in Halliday.

I should point out that as of July, 2010 the new BC Supreme Court Civil Rules come into force and the tests for what types of documents need to be exchanged will be narrower so it will be interesting to see how this area of law changes under the soon to be in place new system.