



CaseNote

2006, No. 01

MORE THAN A PAIN IN THE NECK: BROAD DISCLOSURE REQUIREMENTS FOR PLAINTIFFS IN PERSONAL INJURY CASES

O'Dea v. Lucas

2005 NLTD 98, 249 Nfld. & P.E.I.R. 154, 743 A.P.R. 154, 2005 CarswellNfld 155
(Nfld. S.C.(T.D.))

O'Dea suffered a soft tissue neck injury in a motor vehicle accident for which she claimed that the defendants were liable. She presented a claim to the defendants for special damages, judgment interest, costs and non-pecuniary damages only. No claim was made for future care, loss of earning capacity, loss of housekeeping capacity or any other form of pecuniary damages.

The defendants demanded production of O'Dea's family physician's chart, her entire medicare billing history and all her pharmacy records for a 10 year period prior to the accident. O'Dea agreed only to the release of information relating to her neck injury and any other neck injuries she may have suffered before or after the accident in question, citing a desire to protect her privacy with respect to conditions or treatments she claimed were not relevant to the neck injury action. She then brought an application for an order that the discovery of her medical information be limited to that relating to her neck.

The defendants argued that they required full disclosure of the requested medical information, placing a particular focus on O'Dea's claim for non-pecuniary general damages. One of the aspects of such a claim is a claim for loss of amenities of life. The defendants submitted that without full disclosure, they would be unable to determine whether or not O'Dea had lost an amenity by reason of the neck injury or due to some other pre-existing condition. In addition, full disclosure would allow the defendants to determine whether or not there were other conditions suffered by O'Dea that may impact upon the claimed neck injury. Generally, the information was necessary to be able to measure O'Dea's "baseline condition" prior to the accident.

The Supreme Court of Newfoundland and Labrador (Trial Division) found in favour of the defendants and denied O'Dea's application. Justice Hall explained at paragraph 15:

I accept that information sought by the defendants might be of a highly personal or sensitive nature, the release of which might cause some anxiety on the part of the plaintiff. However I have not been provided with any medical evidence that this will in fact result. I must therefore balance the general privacy interest of the plaintiff against the interest of pursuing truth and disposing properly of the litigation, and in this regard I conclude that justice requires me to find that the plaintiff's privacy interest must give way to the right of the defendant to access to all reasonably relevant information relating to the plaintiff's medical condition before and since the accident.

While not saying so explicitly, Justice Hall appears to be addressing the fourth element of the four-part test (originally developed by Professor Wigmore) that sets out the requirements for a finding that confidential information should be kept privileged. This test was followed by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 and again in *A.M. v. Ryan*, [1997] 1 S.C.R. 157, and provides as follows:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

If these requirements are met, then confidential communications will be kept privileged.

In the present case, the first three of these elements would be met. The communications between O'Dea and her family doctor, her medicare billing history and her pharmacy records are communications that would have originated in a confidence that they would not be disclosed. The element of confidentiality in these communications is essential to the full and satisfactory maintenance of the relation between the parties, and the relation is one which ought to be sedulously fostered. The next step is to look at the fourth requirement, which is essentially a balancing exercise between the injury that would occur if the information were to be disclosed and the benefit that would be gained by such disclosure.

It is this last element that was not met in this case. Justice Hall appears to have agreed with the defendants that the onus was on O'Dea to show that some harm would result from the disclosure of the information. O'Dea presented no evidence that she would suffer any injury as a result of the disclosure and as a result, did not meet the fourth requirement of the Wigmore test.

Justice Hall took a broad view of what information was relevant in this case, and agreed with the defendants that such a broad view was necessary in light of the claim for loss of amenities of life. The relevant information was not solely relating to O'Dea's neck injury. It was all that information required by the defendant to determine what O'Dea's medical condition was prior to the accident, which would then enable the defendants to submit arguments as to what compensation was required to put O'Dea back in that position.

Practically speaking, this case suggests that for personal injury claims, the scope of what medical information of a plaintiff is relevant is fairly wide, particularly where a claim for loss of amenities of life is made. The defendant has a right to such information in able to best present its defence.

A plaintiff who makes a personal injury claim is not, however, without any protection in his her personal medical information. Where a plaintiff can show that the disclosure of the information will result in greater injury than benefit, this information may be kept confidential. Justice Hall's decision suggests that medical evidence to the effect that the plaintiff will suffer injury because of the disclosure may suffice. As noted above, in this case O'Dea did not provide such evidence.

A plaintiff can also raise the argument that particular evidence is not relevant to the claim at hand. It is perhaps worth noting that in the present case, O'Dea's general statement that she wished to preserve her privacy with respect to conditions or treatments which she claimed were not relevant to the action was insufficient for the purpose of limiting disclosure. Something more is required. A claim that information is not relevant may require an application to the court to inspect the records to determine if they are indeed irrelevant to the defence. A plaintiff could also request that the court refuse to order the production of a particular group of documents. For example, if the plaintiff in the present case had suffered post-partum depression seven years ago for a period of three months, the court could make a general order that records relating to any mental depression previously suffered by the plaintiff, but that she no longer experienced, not be produced. Again, this would likely require that some disclosure be made to the court in order for a judge to be able to assess the relevance of a particular group of documents.

In addition, as noted by Justice Hall, restrictions may be placed on the dissemination of information beyond those persons with an immediate need to know the information.

The principles in this case should be of particular note to plaintiffs involved in personal injury claims. A plaintiff, when faced with a demand for full disclosure of his or her past medical history may well be able to protect portions of that information by showing that disclosure will result in a greater harm than benefit, or by showing that the information is not relevant to the claim being made.

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