

CANADA / JUDGMENT

Cook v. Kang

2020 BCSC 575

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2020 BCSC 575 Cook v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cook v. Kang,

2020 BCSC 575

Date: 20200416

Docket: M084033

Registry: Vancouver

Between:

Daryl Edward Cook

Plaintiff

And

Yung Sun Kang and

Kim Young Hee

Defendants

Before: The Honourable Mr. Justice Riley

Reasons for Judgment on Use of Surreptitious Audio Recordings

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April 16, 2020

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(1) Introduction

[1] A number of months before trial in this matter, the plaintiff Mr. Cook attended two separate independent medical examinations ("IMEs") with physicians retained by the counsel for defendants. Mr. Cook made surreptitious audio recordings of both IMEs, and later provided

the recordings to his counsel. The defendants were not made aware of the recordings until Mr. Cook referred to them in cross-examination at trial. After Mr. Cook disclosed the existence of the records, plaintiff's counsel served an amended list of documents identifying the recordings, and has indicated that he may use them in cross-examination of the defence experts who conducted the IMEs.

- [2] Against this backdrop, counsel for the defendants sought a ruling barring the plaintiff from using the surreptitious audio recordings at trial, on two bases. First, it was alleged that plaintiff's counsel did not make timely disclosure of the recordings as required under Rule 7-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] such that the plaintiff should be barred from using them at trial under Rule 7-1(21). Second, it was contended that the plaintiff surreptitiously recorded the IMEs in a manner that was contrary to the Rules, making the recordings presumptively inadmissible under the reasoning in *Bhimji v. Graham*, 2007 BCSC 607 [Bhimji], and in the circumstances of this case the Court should decline to exercise its discretion in favour of admitting them.
- [3] I directed a voir dire to determine the admissibility of the surreptitious audio recordings. At the conclusion of the voir dire, I accepted the position advanced by the defendants, with reasons to follow. These are the reasons explaining why the plaintiff was not permitted to use the audio recordings at trial.

Facts

- [4] On 14 December 2018, Master Vos heard a contested application by counsel for the defendants for an order requiring the plaintiff to attend at two separate IMEs with medical experts retained by the defendants, Dr. Hirsch and Dr. Solomons. At that hearing, plaintiff's counsel argued that the IMEs should be subject to a total of 14 conditions, including conditions (i) permitting Mr. Cook to have a chaperone with him during each of the IMEs, and (ii) expressly prohibiting anyone acting on behalf of the defendants from conducting surveillance of the plaintiff coming and going from the examinations. Neither party sought a term permitting or requiring audio recording of the IMEs.
- [5] On 7 January 2019, Master Vos ruled that the plaintiff Mr. Cook was required to attend an IME with one of the defence-retained physicians, Dr. Hirsch, on certain terms and conditions. In his reasons for judgment, Master Vos did not agree that it was necessary or appropriate to include a term permitting Mr. Cook to have a chaperone present. Master Vos did agree, based on concessions made by both parties as to the appropriate language, that there should be a term prohibiting anyone acting on behalf of the defendants from conducting surveillance of Mr. Cook coming and going from the examination. Master Vos was not asked to consider any term permitting or requiring either party to audio record the IME, and the resulting order did not contain any terms to that effect.

- [6] With respect to the IME with the second defence-retained physician, Dr. Solomons, that aspect of the application was adjourned generally for reasons that are not relevant to the issues addressed in this ruling. Counsel for the defendants later advised plaintiff's counsel that he intended to apply for an order requiring Mr. Cook to attend an IME with a different defence-retained physician, Dr. O'Shaughnessy, in the place of Dr. Solomons. To avoid a contested hearing on that application, counsel suggested that Mr. Cook might agree to attend the O'Shaughnessy IME on the same terms as had been ordered by Master Vos in respect of the Hirsch IME. In an email dated 16 January 2019, plaintiff's counsel indicated that Mr. Cook would attend the O'Shaughnessy IME.
- [7] On 25 March 2019, Mr. Cook attended the Hirsch IME. Mr. Cook made a surreptitious audio recording of the IME. This did not come to the attention of counsel for the defendants until cross-examination of the plaintiff at trial.
- [8] On 3 April 2019, Mr. Cook attended the O'Shaughnessy IME. Once again, Mr. Cook made a surreptitious audio recording of the IME, a fact not made known to counsel for the defendants until Mr. Cook volunteered it in cross-examination at trial.
- [9] The evidence is not clear precisely when Mr. Cook provided the audio recordings of these IMEs to his counsel. Based on submissions of plaintiff's counsel in the course of the voir dire, it would appear that Mr. Cook provided him with the recordings well before the commencement of trial.
- [10] The trial in this matter began on 9 September 2019. Several days into the trial, on 11 September 2019, plaintiff's counsel provided the defence with a further amended list of documents. This list of documents made no reference to the audio recordings. Thus, as of the third day of trial, the plaintiff had not disclosed the existence of the recordings to the defendants.
- [11] The plaintiff Mr. Cook gave testimony in chief over the course of the first two days of the trial. Cross-examination of Mr. Cook began on the third day of the trial. As regards the disclosure of the audio recordings, the salient details are as follows:
- (a) Cross-examination of Mr. Cook began on 11 September 2019, but was stood down several times to accommodate the schedules of other witnesses called to testify in the plaintiff's case.
 - (b) By 17 September 2019, the sixth day of the trial, Mr. Cook was still under cross-examination. On that date, in answering defence counsel's questions concerning what was discussed at the O'Shaughnessy IME, Mr. Cook said his account of the conversation would be corroborated by a surreptitious audio recording of the examination. On at least one occasion in his testimony, Mr. Cook referred to the surreptitious audio recording as a "tape recording".
 - (c) Mr. Cook later added that he also made a surreptitious audio recording of the Hirsch IME.

- (d) When asked if he ever provided the "tapes" or "tape recordings" to his counsel, Mr. Cook responded that he had not. After this exchange, plaintiff's counsel invited the court to excuse Mr. Cook from the witness stand and then volunteered that Mr. Cook had provided him with digital audio recordings of the IMEs.
 - (e) When Mr. Cook returned to the witness stand, he agreed that he surreptitiously recorded both IMEs on digital media and confirmed that he had in fact provided the digital audio recordings to his counsel.
- [12] On 19 September 2019, after Mr. Cook had disclosed the existence of the audio recordings in the course of cross-examination, plaintiff's counsel served a further amended list of documents, in which the audio recordings were listed as documents in the possession of the plaintiff. It appears to be common ground that at that point in time, the recordings had not yet been transcribed. The transcripts later marked in evidence on the voir dire, prepared and certified by a court-approved transcription company, were completed on 22 September 2019.
- [13] The plaintiff's case concluded on 23 September 2019, the tenth day of trial, subject to a ruling regarding the admissibility of certain clinical records.
- [14] At the outset of the case for the defendants, counsel sought a ruling barring the plaintiff from relying upon both the audio recordings and the transcripts of same. The court directed a voir dire. The exhibits marked in evidence on the voir dire included (i) transcripts of the surreptitiously recorded Hirsch and O'Shaughnessy IMEs, (ii) an affidavit attaching the defence IME application materials, the reasons for judgment of Master Vos, the resulting order for the Hirsch IME, and correspondence pertaining to the O'Shaughnessy IME, (iii) an affidavit attaching the plaintiff's 11th and 12th amended lists of documents, and (iv) a written summary of alleged inconsistencies between Dr. O'Shaughnessy's expert report and the transcript of the surreptitiously-recorded IME.

Analysis

- (1) Failure to Make Timely Disclosure of the Audio Recordings
- [15] Rule 7-1 governs discovery and inspection of documents. Under Rule 7-1(1), each party is obliged to serve the opposing parties with a list of all documents in the listing party's possession (i) that could be used by any party to prove or disprove a material fact or, (ii) to which the listing party intends to refer at trial. Rule 7-1(9) requires each party to promptly amend and serve an amended list of documents where the original list is determined to be incomplete or where additional documents come into the listing party's possession. Thus, Rule 7-1 imposes an ongoing obligation to disclose relevant documents by listing them in a manner that allows the opposing party to know of their existence and exercise its right to inspect them.

- [16] Rule 7-1(21) deals with the consequences of failure to properly list a document. It provides that "[u]nless the court orders otherwise", a party who fails to make proper discovery of a document "may not put the document in evidence in the proceeding or use it for the purposes of examination or cross-examination". As explained by Mr. Justice Steeves in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCSC 1221 at para. 13, "[t]he obvious purpose of these rules is to prevent trial by ambush".
- [17] In the case at bar, the documents in issue are surreptitious audio recordings made by Mr. Cook. These documents came into the possession of the plaintiff, Mr. Cook, when he created them more than four months before trial. The evidence was not precise as to when Mr. Cook provided the documents to his counsel, but that is really an aside, since the obligation to identify and list documents falls upon the party and no distinction is drawn between the party and his or her counsel. Where the party is represented, counsel is expected to keep informed of all relevant documents that come into the client's possession in the course of the litigation, to ensure ongoing compliance with Rule 7-1.
- [18] There was some debate during the voir dire as to whether the documents in issue here, surreptitious audio recordings of IMEs, fell within the scope of relevance contemplated by Rule 7-1(2). In particular, plaintiff's counsel suggested that the audio recordings were not documents that could be used "to prove or disprove a material fact", nor were they documents which the plaintiff had formed a firm intention to use at trial.
- [19] Plaintiff's counsel suggested that the only potential use of the audio recordings would be to cross-examine the expert witnesses called by the defendants. Thus, plaintiff's counsel argued, the recordings were relevant only to witness credibility and not a "material fact" as contemplated in Rule 7-1(1)(a)(i). Counsel further asserted that he could form no firm intention to refer to the recordings at trial as contemplated in Rule 7-1(1)(a)(ii) unless and until the defence experts gave testimony at trial that was inconsistent with the recordings.
- [20] On the latter point, plaintiff's counsel acknowledged that it might have been theoretically possible for him to compare the content of the audio recordings to the content of the defence expert reports, but went on to explain that he did not do that in advance of trial. Plaintiff's counsel acknowledged having received the audio recordings at some unspecified time in advance of trial, but stated that he did not listen to them, and only had them transcribed after Mr. Cook disclosed their existence to the defence in the course of his cross-examination.
- [21] I do not accept the plaintiff's submission that the audio recordings fall outside the scope of Rule 7-1(1). I say that for two reasons.
- [22] First, these recordings are not extraneous materials the only conceivable use of which would be for cross-examination of defence witnesses on collateral issues. These recordings, created by the plaintiff himself, contain statements by the plaintiff on facts material to his case. In particular, the recordings include statements by the plaintiff pertaining to his present physical and psychological condition, as well as his personal background, his

recollection of the collisions in issue in the litigation, and the effects of those collisions on his physical and psychological state. All of these are material facts. The recordings may not furnish independent proof of those material facts, but they could still be "used" by the defendants to cross-examine the plaintiff in an effort to disprove material facts pertaining to his claim.

- [23] Second, even if the sole utility of the recordings were for potential cross-examination of defence experts, this would not necessarily take them outside the scope of Rule 7-1(1). Cross-examination of an opposing party's witnesses is not limited to cross-examination on prior inconsistent statements. Moreover, as Mr. Justice Harris, then a member of this Court, stated in *Tran v. Kim Le Holdings Ltd.*, 2011 BCSC 1463 [Tran] at para. 15 even cross-examination based upon prior inconsistent statements can be used "to prove or disprove material facts", because such cross-examination "may go well beyond merely affecting credibility". In the context of an action for damages arising out of a vehicle collision, cross-examination of a defence expert on things that happened or were said during an IME may elicit evidence on material facts, including admissions or concessions by the expert which bear on issues of both causation and damages.
- [24] Plaintiff's counsel cited *Beazley v. Suzuki Motor Corporation*, 2010 BCSC 613 [Beazley], in which Mr. Justice Goepel, then a member of this Court, stated at para. 8 that "[m]ost documents which go to challenge an expert's opinion on credibility are not documents which are related to the matter in question in the action". I take that to be an assertion that most documents that are used to challenge an expert's credibility are often, in effect, documents on collateral issues the sole utility of which is to test the witness's credibility. This is contrasted with documents that someone relate to the matter in question.
- [25] I accept that there is a line to be drawn. On one side of the line, I would place documents which could be used solely to challenge credibility (which may not be caught by Rule 7-1(1), or alternatively may be subject to privilege as part of the solicitor's brief until the expert says something inconsistent with them) as discussed in *Beazley*. On the other side of the line, I would place documents which could be used for broader purposes in an effort to prove or disprove a fact in issue as discussed in *Tran*. In this case, I have no difficulty concluding that the surreptitious audio recordings of IMEs attended by the plaintiff fall into the latter category. The audio recordings are not extraneous materials the sole utility of which would be for cross-examination of the defence experts on collateral matters. Rather, they are, to use Goepel J.'s language in *Beazley*, "related to the matter in question".
- [26] I therefore conclude that the plaintiff failed to properly list the audio recordings as required under Rule 7-1. Turning to the consequence of the plaintiff's non-compliance with the Rules, I must apply Rule 7-1(21), which provides that a party who fails to make proper discovery of a document will not be permitted to use the document at trial, unless otherwise ordered. The court thus has a discretion to permit use of the document at trial despite the failure to properly disclose it. The burden of persuasion rests on the party seeking to use the document to convince the court that it is appropriate to do so despite that party's non-

compliance with the Rules: *Kursar v. BCAA Insurance Corp.*, 2006 BCSC 586 at para. 18.

- [27] The case law under what is now Rule 7-1(21) directs the court to consider a number of factors deciding how to exercise this discretion. These factors can be summarized as follows: (a) whether the opposing party will be prejudiced by the proposed use of the document; (b) whether a reasonable explanation has been provided for the failure to properly disclose the document; (c) whether refusing permission to use the document would be an impediment to determining the merits of the case; and (d) whether, in the circumstances of the case, the ends of justice require that permission be given to use the document despite the failure to properly disclose it: *Tran* at para. 19; see also *Stone v. Ellerman*, 2009 BCCA 294; *Dykeman v. Porohowski*, 2010 BCCA 36; *Cahoon v. Brideaux*, 2010 BCCA 228.
- [28] Some of these factors may "tilt in favour" of permitting use of the document, while others may "tilt against it". The court is required to weigh and balance all of the relevant factors in deciding whether to permit use of a document at trial despite the failure to make proper disclosure: *Tran* at para. 23.

(1)(a) Prejudice

- [29] I will deal firstly with the question of whether the opposing party, the defendants, would be prejudiced by the plaintiff's use of the transcripts at trial. In my view, there would be prejudice to the defendants, in several ways.
- [30] The potential prejudice to the defendants includes the fact that counsel did not have the benefit of the recordings in advance of his cross-examination of Mr. Cook. Since Mr. Cook was a party to the recorded conversations, it would have been open to counsel for the defendants to use them in cross-examination. But counsel was not even aware of the existence of the recordings until several days into the cross-examination.
- [31] Of course, it might be suggested that since the recordings were made known to the defendants then and included in an updated list of documents served before the cross-examination of Mr. Cook had concluded, it would have been open to counsel for the defendants to immediately demand a right to inspect the recordings, before continuing with and concluding the cross-examination. However, that approach would not necessarily have suited the defendants, because counsel was already several days into his cross-examination of Mr. Cook. It is difficult to say whether counsel would have approached the cross-examination in the same way if he had the recordings in advance. And stopping the cross-examination to request the recordings, review them, confirm their accuracy, assess their evidentiary significance, and integrate them into a cross-examination that had already spanned several days of court time would have been no mean feat. It is quite likely that such an approach would have led to an adjournment of the entire trial.

[32] Similar forms of prejudice would arise if the plaintiff were permitted to use the recordings (or transcripts) in cross-examination of the defence experts. Plaintiff's counsel provided copies of the audio recordings and transcripts on or about 23 September 2019, one day before the commencement of the defence case. Once again, in order to properly prepare for examination in chief of the two defence witnesses, Dr. O'Shaughnessy and Dr. Hirsch, counsel for the defendants would have to review the recordings and transcripts, confirm their accuracy, assess their evidentiary significance, and consider how they might affect his examination of the witnesses. I do not consider that it would have been feasible for the defendants to achieve all of this while in the process of presenting their own case. Thus, permitting the plaintiff to use the recordings (or transcripts) for cross-examination of the defence experts would very likely have resulted in an adjournment of the proceedings part way through the trial, with all of the attendant delay and additional cost that accompanies such a development.

(1)(b) Explanation for Failure to Make Timely Disclosure

[33] I turn next to the question of whether the plaintiff has given a reasonable explanation for the failure to make timely disclosure of the recordings. At various points, plaintiff's counsel put forward two different positions with respect to the failure to list the recordings as required under Rule 7-1, namely (i) that the recordings did not fall within the scope of the Rule 7-1(1), and (ii) that the recordings were privileged. I find it convenient to deal with these points in reverse order.

[34] With regard to privilege, the Court of Appeal's decision in *Stone* is instructive. There, the plaintiff sought to rely at trial on a "pain diary" that had not been listed as a discrete document in her list of documents. Plaintiff's counsel took the position that the document fell into what the trial judge referred to as a "boilerplate" claim of litigation privilege with respect to, inter alia, "notes and documents, correspondence, minutes of evidence, memoranda being the work product of plaintiff's legal advisors". On appeal, Finch C.J.B.C., for the majority, held at para. 29 that while the "pain journal" might properly have been characterized as within the lawyer's brief, the description of it "failed to provide any information that would have made the defendants aware of a document in the 'category of subject' of the pain journal or enabled them to assess the validity of the claim of privilege". In this context, the trial judge was found at para. 35 to have erred in, inter alia, not considering whether there was any reasonable explanation for the failure to comply with the disclosure rule.

[35] Applying the reasoning in *Stone* to the case at bar, even if the surreptitious audio recordings of the IMEs could properly be characterized as part of the solicitor's brief or otherwise protected by litigation privilege, plaintiff's counsel did not comply with Rule 7-1(6) by listing the documents as privileged under Part 4 of Form 22. Accordingly, the defendants were deprived of the opportunity to assess any such privilege claim in advance of trial. In his written submissions, plaintiff's counsel asserted that the audio recordings were privileged but made no attempt to explain or justify his failure to identify the recordings in any way

whatsoever so as to make it clear that there were items of a particular type or from a particular date which were not being disclosed on the basis of privilege. Instead, counsel focused his submission on the first point above, namely the submission that the subject audio recordings were not caught by the scope of relevance contemplated in Rule 7-1(1).

- [36] I turn next to the explanation that was the focus of plaintiff's oral submissions in the voir dire, namely that from his perspective it was arguable that the transcripts fell outside the scope of relevance contemplated in Rule 7-1(2). Recall that I rejected the plaintiff's narrow theory of relevance in paragraphs 21 to 25 above. At this stage, the focus of the counsel's submission was not to challenge the correctness of that conclusion, but rather to assert that it was reasonable for him to have held a different view at an earlier point in time, justifying his decision not to list the recordings. In other words, counsel submitted that even if his position turned out to be legally incorrect, it was a reasonable position for him to have taken at the time. Plaintiff's counsel cited Tran at para. 30, wherein Harris J. reasoned as follows:

While I may not agree with the decision that was reached about whether the documents should have been listed, I accept that, first of all, such a decision was made; secondly, that it was made conscientiously in the discharge of counsel's professional obligations; and that thirdly, the issue itself is not so clearly free from doubt that the call that was made by counsel should be judged as being unreasonable.

- [37] I do not find that line of reasoning to be apt in the case at bar. If at some point the scope of Rule 7-1(1) was uncertain in this context, Harris J.'s analysis at para. 13 to 16 of Tran largely removed that uncertainty. The discussion of relevance in Tran demonstrates the potential litigation risk associated with taking the narrow position that a particular document is not caught by the disclosure rule because its sole utility would be in cross-examination of an opposing party's witness on a prior inconsistent statement. Without definitively deciding the point, Harris J. was skeptical of the submission that "a prior inconsistent statement is not a document that could be used to prove or disprove a material fact", reasoning at para. 13 to 15 that prior inconsistent statements can sometimes be used to prove or disprove material facts.
- [38] For my part, I would say it is not necessary to fashion any categorical rule about the whether a document that is said to be relevant solely to cross-examination of an opposing party's witness on credibility is or is not caught by Rule 7-1(2). It is enough to say that characterizing a document as being solely relevant to cross-examination on credibility may be a risky position. It is particularly risky where the alleged prior inconsistent statement pertains to something that is not a collateral fact. In this particular case, I find it impossible to conceive of how the plaintiff's surreptitious recordings of his own IMEs could be anything other than "documents related to the matter in question in the action" as discussed by Goepel J. in Beazley. These were not documents pulled off the internet or dug up in academic research, completely unrelated to the case at bar, for use in cross-examination of an opposing party's expert witness. They were audio recordings in which the plaintiff himself made statements about the very things in issue in the litigation, including the nature of his injuries and their

effects.

- [39] In *Tran*, Harris J. observed that "[a] fine parsing of the obligation to list documents is, in my view, contrary to the policy of disclosure which is exemplified in the *Stone* decision in the Court of Appeal". I agree with that sentiment and I find it particularly telling in evaluating the reasonableness of the plaintiff's explanation in the case before me. To the extent that the failure to disclose the recordings in a timely way rested on the judgment of plaintiff's counsel in taking the position that the recordings were outside the scope of relevance in Rule 7-1(1), it was unreasonable for counsel to have taken such a position on the facts of this particular case. I conclude that the plaintiff has not furnished a reasonable explanation for the failure to make timely disclosure of the recordings.

(1)(c) Impact on the Court's Ability to Decide the Case

- [40] I have been given no reason to believe that refusal to permit use of the recordings would pose an impediment to deciding the merits of the case. This is not a case where resort to a particular document that has not been disclosed in accordance with the Rules is likely to impact significantly on the search for the truth.
- [41] Mr. Cook was able to give viva voce evidence about what took place during the IMEs, and his counsel will have the opportunity to cross-examine both experts, Dr. Hirsch and Dr. O'Shaughnessy. In cross-examining these witnesses, plaintiff's counsel will have the benefit of their expert reports and working notes. He will also have his client's instructions as to what took place during the IMEs, and he can use that information for the purposes of cross-examining the experts.
- [42] In his written submission, plaintiff's counsel relied on the "best evidence rule" to assert that "when primary evidence is available, the Court ought not to admit secondary evidence". The plaintiff's reliance on the best evidence rule is misplaced. The subject matter is surreptitious audio recordings of IMEs, and IMEs are governed by Rule 7-6. The purpose of the rule is not to create a process for a full trial on the IME itself, but rather to create a level playing field by furnishing the defendants with an opportunity to obtain an independent examination of the plaintiff's condition: see *Stainer v. ICBC*, 2001 BCCA 133 at para. 8. The examinations conducted by the plaintiff's medical experts were not audio recorded, and there is no reason to believe a complete audio record of the defence IMEs is necessary for a fair trial of this case on its merits.
- [43] Plaintiff's counsel further asserted in his written submissions that "it is no part of natural justice to allow a witness to give false testimony with impunity". This implies that use of the audio recordings or associated transcripts is necessary to prevent or expose "false testimony" on the part of the defence experts. When asked to particularize this submission, counsel furnished a list of points on which he said the facts set out in Dr. O'Shaughnessy's expert report were inconsistent with the audio recordings and transcripts. Having perused the plaintiff's list, I was unable to find any clearly discernible contradictions on material points.

- [44] Plaintiff's counsel focused on differences between the language in Dr. O'Shaughnessy's expert report and notes and the precise words and phrases uttered by Mr. Cook and Dr. O'Shaughnessy in the verbatim transcript. I do not consider this approach to be particularly fruitful, since the report does not profess to contain a verbatim account of the dialogue between Dr. O'Shaughnessy and Mr. Cook during the assessment, and I would not expect the notes to be verbatim either. The most that could be said is that counsel might be able to use the transcript of the IME to cross-examine Dr. O'Shaughnessy on differences between the precise phrases or terms found in the report, or the notes, and the precise words uttered by either Dr. O'Shaughnessy himself or Mr. Cook during the assessment.
- [45] With regard to the second defence expert, Dr. Hirsch, plaintiff's counsel did not present a similar list of alleged inconsistencies between his report and the verbatim transcript prepared from the plaintiff's surreptitious recording. Plaintiff's counsel says any differences between Dr. Hirsch's report and the verbatim transcript of the Hirsch IME are "less dramatic" than is the case with the O'Shaughnessy IME. Having identified little in the way of clear inconsistency between the transcript of the O'Shaughnessy IME and expert report, I have no reason to believe that the plaintiff's proposed reliance on the transcript of the Hirsch IME would be any more fruitful in the search for the truth.
- [46] I have not been shown anything in the nature of an offer of proof in support of the submission that use of the surreptitious audio recordings is necessary to prevent or expose any "false testimony" on the part of the defence experts. This case is clearly distinguishable from *Tran*, in which the plaintiff sought to use a previously undisclosed audio recording of a statement given by a defence witness that was demonstrably inconsistent with the witness's trial testimony on a factual point that was potentially "material to the disposition of the case". In those circumstances, the court was concerned that barring the use of the document "may indeed prevent the determination of the issue on its merits": *Tran* at para. 3, 31.

(1)(d) Interests of Justice

- [47] The interests of justice do not weigh in the plaintiff's favour in seeking to use the recordings. Allowing the plaintiff to use the recordings despite the failure to make timely disclosure of their existence would be contrary to the object of Rule 7-1. It would also undermine the fairness of the trial, since the plaintiff has had access to the recordings all along, whereas the defendants did not learn of them until several days into the cross-examination of the plaintiff, who is properly regarded as the key witness in the case. In this context, the defendants were denied the opportunity to enquire into the contents of the recordings and properly integrate that information into their position as the trial unfolded. That denial would be compounded by allowing the plaintiff to make use of the recordings in cross-examination of defence witnesses.

(1)(e) Conclusion

- [48] None of the factors discussed in the case law weigh in the plaintiff's favour. My conclusion is that this is not a proper case for the court to exercise its discretion to permit the use of documents that have not been properly disclosed under the Rules.
- (2) Admissibility of Surreptitious Audio Recordings
- [49] Counsel for the defendants also sought a ruling that the audio recordings are inadmissible on the basis that they were recorded surreptitiously in the course of IMEs. Counsel argued that the entire IME process is governed by Rule 7-6 and the case law applying that provision, which contemplate that where either party wishes to make an audio recording of the assessment process that issue must be raised and dealt with as part of the IME order. Counsel submitted that unilateral surreptitious audio recording of IMEs is not permitted, such recordings are presumptively inadmissible under the reasoning in *Bhimji*, and the plaintiff has failed to rebut the presumption of inadmissibility.
- [50] In response, plaintiff's counsel asserted that as a starting point, all relevant evidence is admissible in the absence of an exclusionary rule. Counsel submitted further that in the context of a civil proceeding, there is no law prohibiting surreptitious audio recording of a private conversation by a person who is a party to the conversation. In support of this proposition, counsel cited a host of cases in which surreptitious audio recordings have been admitted in civil proceedings. Counsel contended that in the absence of some law or court order expressly prohibiting Mr. Cook from surreptitiously recording his IME assessments, he was free to do so, and that the resulting recordings and transcripts are highly reliable, first hand evidence of what took place at the IMEs.
- [51] I agree with plaintiff's counsel that it is not illegal for a person to surreptitiously record a private conversation to which that person is a party and therefore consents to the recording as contemplated in s. 184(2)(a) of the Criminal Code, R.S.C. 1985, c. C-46. There are indeed a host of cases in which surreptitious audio recordings made by non-state agents have been admitted and relied upon as evidence in civil and proceedings: *Evans v. Teamsters Local Union No. 31*, 2006 YKCA 14 at para. 8; *Palkovics v. Barta*, 2012 BCSC 621 at para. 21-22; *Silverhill Homes v. Borowski*, 2019 BCCA 227 at para. 38; *Finch v. Finch*, 2014 BCSC 653 at para. 62; *Lam v. Chiu*, 2012 BCSC 440 at para. 20-32.
- [52] What makes the present situation distinguishable from all of those cases is the fact that in the case at bar Mr. Cook made the surreptitious audio recordings during a medical examination which took place under the auspices of the IME process provided for under Rule 7-6. In the case to Dr. Hirsch's IME, there was a court order in place. In the case of Dr. O'Shaughnessy's IME, there was an implicit agreement between the parties that the examination would take place on the same terms. In both instances, the IMEs took place as part of the court's processes.
- [53] Plaintiff's counsel did cite one case, *Franks v. Ruddiman*, 2003 BCSC 1342, in which the court declined to rule the transcript of a surreptitiously recorded IME inadmissible. However, *Franks* was a judgment given at the conclusion of a 45 minute chambers hearing, in which

the court was presented with a three-volume chambers record and then asked to rule on a total of eight issues. With regard to the surreptitious recording, the defendant objected to plaintiff's use of the transcript but argued in the alternative that the plaintiff should be required to use "an official court reporter's version" of the transcript. The court agreed with the defendant's alternative position. The reasons for judgment contain no discussion of the defendant's arguments, no reference to the applicable Rules and case law, and no explanation for the court's conclusion. I am thus unable to discern the rule or principle under which the transcript of the recording was determined to be admissible. I consider this to be "a nisi prius judgment given in circumstances familiar to all trial Judges", as discussed in *Re Hansard Spruce Mills Limited*, [1954] 4 D.L.R. 590 (B.C.S.C.) at 592.

- [54] The admissibility of surreptitiously-made IME recordings was squarely raised and fully argued in *Bhimji*. In that case the plaintiff made surreptitious audio recordings of IMEs. Plaintiff's counsel had been aware of the recordings for some time prior to trial, though he had not advised his client to make them. Plaintiff's counsel initially claimed privilege over the recordings but four days before trial changed his position and listed them in a supplementary list of documents. Thus, unlike in the case at bar, the existence of the recordings was disclosed to the opposing counsel before the trial commenced. Still, the defence objected to the admissibility of the recordings on the basis that they were made surreptitiously, without leave of the court, in the course of court-ordered assessments.
- [55] Madam Justice Garson, then a member of this Court, reasoned as follows at paras. 5 to 7:
- [5] The case of *Wong v. Wong*, 2006 BCCA 540, is authority for the proposition that, while a judge or master does have discretion to permit the recording of a Rule 30 independent medical examination, that discretion to permit recording should rarely be exercised.
- [6] Whether or not such a discretionary order would have been made in this case is beside the point. The plaintiff did not seek such an order and so, in my view, the evidence was unlawfully obtained. Mr. LeBlanc argues that it is not unlawful to record a conversation to which the recorder is a party. It is true that there is no such prohibition in the Criminal Code of Canada, but in the context of a personal injury lawsuit, and in the context of an independent medical examination, the British Columbia Court of Appeal has stated that a plaintiff is not entitled to record the examination without first obtaining leave of the Court. I, therefore, conclude, as I have said, that this recording was obtained in contravention of the Rules of Court.
- [7] The next question is whether I ought to order that it is inadmissible for all purposes at this trial, at the behest of the plaintiff.
- [56] And further at paras. 14-16:
- [14] The examiner's appointment under Rule 30 makes the examiner an officer of the Court for that limited purpose. In my view, to allow the recording of such an examination, in the face of clear authority that leave must first be obtained, would bring the administration of justice

into disrepute. The Court ought not to sanction the conduct of the party in doing surreptitiously that which she could not otherwise do except with leave of this Court. The Court must have some jurisdiction to ensure that its process is not abused in this way. That jurisdiction must be the discretion to rule that such unlawfully obtained evidence is inadmissible.

- [15] I have concluded that all of the recordings are presumptively inadmissible. If, in the course of the trial, one or other of the parties is of the view that the interests of justice require the use of these recordings, either party has leave to apply in the context of particular evidence of a particular witness. I will hear such an application, and if necessary, evidence by voir dire at that time.
- [16] I should add that I would not, owing to the anticipated length of this trial, rule that the recordings are not admissible solely on account of their late disclosure under Rule 26.
- [57] As I understand Garson J.'s approach in *Bhimji*, she addressed the issue in two stages.
- [58] At the first stage of the analysis, the court in *Bhimji* determined that the surreptitious recordings were "unlawfully obtained". The court held that the recordings were not unlawful in the sense that the plaintiff had not committed a crime in making them, but they were obtained unlawfully in the sense that they were made surreptitiously as part of a court-approved IME process without "first obtaining leave" of the court. In other words, the IMEs were part of the court process, and the plaintiff's surreptitious recording of the examinations without leave of the court was abusive of that process.
- [59] At the second stage of the analysis, having found that the recordings were obtained unlawfully, the court in *Bhimji* went on to consider their admissibility at trial. At this stage, the court reasoned that it ought not to approve of the plaintiff's conduct in doing surreptitiously something he could not otherwise have done without leave of the court, that is, recording a court ordered IME. On this basis the court held that the recordings were presumptively inadmissible, subject to the discretion to later admit them if it were shown to be necessary in the interests of justice.
- [60] In the matter before me, plaintiff's counsel took issue with the soundness of the reasoning and result in *Bhimji*. He argued that the decision rests on an over-reading of *Wong v. Wong*, 2006 BCCA 540 [Wong].
- [61] In *Wong*, the Court of Appeal was asked to decide whether a chambers judge or master dealing with an application for an IME had the discretion (under Rule 30 of the former Rules) to include a term granting or refusing permission to record the court ordered medical examination. In the majority decision, Finch C.J.B.C. held at para. 30 that the power to make an order for a medical assessment under the former Rules "must necessarily include a residual discretion to impose reasonable limits, terms or conditions on the making of such an order, including the jurisdiction to permit, or prohibit, the use of an audio tape recorder". The majority also held at para. 48 that the discretion to order audio recording of an IME

should be exercised "rarely and with restraint", only where there is "cogent evidence" that audio recording will "advance the interests of justice".

- [62] In concurring reasons, Saunders J.A. agreed with the majority's conclusion but went on to add several points. One point was that "but for the fact that the examination occurs as part of the court process", the plaintiff would have been "free to record any meeting to which he was a party": Wong at para. 52. A further point made by Saunders J.A., speaking for herself on this, was that "a robust attitude to the use of recording devices should be the norm", such that their use would be justified in any case where there is a reasonable explanation for the request and no convincing reason not to allow it: Wong at para. 56.
- [63] Returning to the arguments in the case at bar, plaintiff's counsel submitted that Bhimji was wrongly decided because the Court of Appeal did not state in Wong that "a plaintiff is not entitled to record the examination without first obtaining leave of the Court". In fact, all the majority decided was that a chambers judge or master has jurisdiction to include within an IME order a term either allowing for or prohibiting recording of the examination. I have three responses to counsel's submission on Bhimji.
- [64] First, under the doctrine of judicial comity I am expected to follow the earlier decision of another judge of this Court unless there is a basis for reconsidering it as discussed in *Re Hansard Spruce Mills Limited*. I have been given no good reason to reconsider the point decided in Bhimji. If the issue is to be revisited, that must occur in a higher court.
- [65] Second, while the ratio decidendi in Wong may have been limited to the question of jurisdiction, the clear implication of the decision is that where the IME process is engaged, any party wishing to record the examination would be expected to seek leave of the court to do so. In other words, while the Court of Appeal may not have "stated" that a party cannot record a court-ordered IME without obtaining leave, that is a necessary implication of the decision. In this sense, there was good reason for the court in Bhimji to place reliance on Wong.
- [66] Third, even without the any reliance on Wong, the underlying reasoning in Bhimji is compelling and unassailable. Where the court process is invoked to obtain an IME for use in litigation, a party wishing to make an audio recording of the examination must obtain leave of the court to do so. A party cannot do surreptitiously that which he or she would otherwise only be permitted to do with leave of the court. A surreptitious recording of an IME, made without court approval, is therefore "obtained unlawfully" in the sense that it is obtained in a manner that is contrary to the Rules and abusive of the court's process.

- [67] I would apply that reasoning to the plaintiff's surreptitious recording of the Hirsch IME. I would apply the same reasoning to the plaintiff's surreptitious recording of the O'Shaughnessy IME, which did not take place under the Rules but nonetheless took place on the implicit agreement of counsel that it would proceed on the same terms as the Hirsch IME. I conclude that both recordings, the Hirsch recording and the O'Shaughnessy recording, were "obtained unlawfully", in a manner that was contrary to the Rules.
- [68] Moving on to the second question, as to whether the recordings should be ruled inadmissible, the approach taken in *Bhimji* was to characterize "unlawfully obtained" recordings as "prima facie inadmissible". To proceed otherwise would allow the plaintiff to do surreptitiously that which he did not seek leave to do directly.
- [69] In *Bhimji*, the court suggested that it might be necessary to hold a voir dire to determine whether it would be necessary to admit a particular recording, "in the interest of justice". In the case at bar, a voir dire was held at the conclusion of the plaintiff's case. The court thus has the benefit of the plaintiff's testimony, giving his account of what happened at the Hirsch and O'Shaughnessy IMEs. Having been shown transcripts of the audio recorded conversations, I am not satisfied that they contained any evidence essential to the plaintiff's case, that he could not get from some other source. Even without the recordings, plaintiff's counsel will still have the opportunity to cross-examine Dr. Hirsch and Dr. O'Shaughnessy, armed with Mr. Cook's version of what happened at the IMEs, and also with the benefit of the expert reports and clinical notes of the witnesses. I have not been given any basis for a concern that denying the plaintiff use of the recordings at trial would frustrate or undermine the truth seeking process, for example by allowing potentially false testimony to go unchecked, or by denying the plaintiff the ability to adduce evidence on a factual point that is potentially material to the disposition of the case.
- [70] My conclusion is that (i) the surreptitious audio recordings and resulting transcripts are prima facie inadmissible because they were obtained unlawfully in the sense that they were obtained in a manner that was contrary to the Rules, and (ii) it would not be in the interests of justice to admit them.

Summary

- [71] My ruling is that the surreptitious audio recordings and resulting transcripts are inadmissible at trial on two bases. First, these materials were not listed as required under Rule 7-1 and I have not been convinced that this is a proper case to exercise my discretion to allow their use at trial pursuant to Rule 7-1(21). Second, these materials are prima facie inadmissible on the basis that they were obtained or created in a manner that was contrary to Rule 7-6 and in this sense unlawful, and I am not satisfied that it is otherwise in the interests of justice to permit their admission at trial.

"Riley J."

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