
CANADA / JUDGMENT

Eastman v. Eastman

2013 BCSC 1019

COURT

Supreme Court of British Columbia

DECIDED

7 June 2013

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2013 BCSC 1019 Eastman v. Eastman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Eastman v. Eastman,

2013 BCSC 1019

Date: 20130607

Docket: M105965

Registry: Vancouver

Between:

Kristjana (Jenna) Eastman, an infant by

her Litigation Guardian Sean Eastman

Plaintiff

And:

Lindsey Elizabeth Eastman, Maureen Cameron, Debra Lee Pattison,

Her Majesty The Queen in Right of the Province of British Columbia,

as represented by the Ministry of Transportation and

Infrastructure, Yellowhead Road & Bridge (Fort George) Ltd.

Defendants

And:

Lindsey Elizabeth Eastman, Maureen Cameron,

and Debra Lee Pattison

Third Parties

Before: Master G. Taylor

Reasons for Judgment

Counsel for the Plaintiff:

N. Tsoi

Counsel for the Defendant and Third Party,

Lindsey Elizabeth Eastman:

C. A. Bennett

Place and Date of Hearing:

Vancouver, B.C.

May 8, 2013

Written Submissions of the Defendant and

Third Party, Lindsey Elizabeth Eastman Received:

May 16, 2013

Written Submissions of the Plaintiff Received:

May 24, 2013

Defendant's Reply Submissions Received:

May 26, 2013

Place and Date of Judgment:

Vancouver, B.C.

June 7, 2013

- [1] This matter relates to a motor vehicle accident which occurred on January 29, 2006. The trial is scheduled to commence on September 9, 2013 for 15 days. Accordingly, the 84-day deadline for delivery of expert reports is June 14, 2013. This application was heard on May 8, 2013, after which I indicated to counsel that written submission on this point would be appreciated. Given the little amount of time left before the 84-day deadline, counsel agreed between themselves as to the schedule for their respective written submissions and replies.

- [2] The defendant and third party, Lindsey Elizabeth Eastman (the "Applicant"), seeks an order for production of "any results or cognitive testing, aptitude testing, IQ testing, tutoring, etc., that have not previously been produced, including the raw data from all neuropsychological assessments conducted in relation to the plaintiff to the date of the tests conducted by the Applicants' expert, namely April 12, 2013", pursuant to Rules 1-3, 7-1 and 13-1(9) of the Supreme Court Civil Rules.
- [3] The plaintiff opposes the application on the basis of solicitor's brief privilege.

Discussion and Analysis

- [4] The Applicant says the rationale for this application is so that the neuropsychologist hired by the Applicant can be "of the most assistance to the court".
- [5] Filed as an exhibit to the affidavit of an administrative assistant in the office of the solicitors for the Applicant is a letter from Michael Joschko, Ph.D., a registered psychologist who holds himself out as a consultant in clinical psychology and clinical neuropsychology. In the letter, dated April 19, 2013, Dr. Joschko talks about minimizing 'practice effects'. According to Dr. Joschko,

'practice effects' can influence an individual's test performance in two major ways. The person taking the test a second time may perform better due to remembering the test and test answers/procedures from a previous testing session, or the individual's test performance may decrease (worsen) due to boredom and/or irritation at having to complete the same test. In either case the interpretation of an repeated tests is problematic. 'Practice effects' are most pronounced when the time between two test administrations is relatively short, or when the tests used contain something particularly novel or an unexpected twist and where prior exposure ruins the novelty of the test procedure.

A valid interpretation of neurocognitive test results requires that the various factors that could affect the validity of the obtained results be understood and taken in account -- 'practice effects' are particularly important in this regard. If not properly integrated into the interpretation of neurocognitive test results, 'practice effects' can easily lead to false conclusions: (i) cognitive problems obscured by practice may be underestimated, (ii) cognitive problems may be overestimated as a result of poor test results produced when individuals are irritated or bored during a repeated test, or (iii) improvements due to treatment or natural recovery may be overestimated.

it is my opinion that the results of any previous neuropsychological tests administered to Ms. Eastman need to be taken in account to fully understand the results of my own assessment of Ms. Eastman, and in order for me to offer a neuropsychological opinion that would be of the most assistance to the court.

- [6] The Applicant relies heavily on the decision of Madam Justice Arnold-Bailey in the case of *Gulamani v. Chandra*, 2009 BCSC 1393, where the learned Justice reviews the decisions of *Stainer v. Plaza*, 2001 BCCA 133 [Stainer] and *Traynor v. Degroot*, 2001 BCCA 556 [Traynor]. According to Justice Arnold-Bailey, Stainer and Traynor clearly indicate that any notes, annotations, recordings, or working papers that reveal an examining doctor's confidential opinion or advice to counsel will, generally, be privileged. But, she also maintains at paragraph [25] that the same cases also illustrate that notes or recordings that capture the factual history given by the plaintiff to an examining doctor, as well as raw test data and results, are outside the scope of solicitor-client privilege and are subject to production.
- [7] Further, at paragraph 26, the learned Justice maintains there is a clear distinction between an expert's working papers, which contain opinions, or which may be prepared for the sole purpose of advising counsel, and the facts underlying those opinions or advice.
- [8] At paragraph 29, Arnold-Bailey J. says that the passages from Stainer from which she has already quoted, reaffirm that even the solicitor's brief privilege can be trumped when it comes to the bare facts, since it is well settled that "there can be no property in a witness of fact".
- [9] The Applicant relies on a number of other cases including; *Bates v. Stubbs* (1979), 101 D.L.R. (3d) 623 (BCCA); *Nikolic v. Olson*, 2011 BCSC 125; *Mayer v. Mayer*, 2012 BCCA 77; *Arpeg Holdings Ltd. v. Vancouver (City)* (1981), 28 B.C.L.R. 273 (BCCA) and *Morey v. Lemon; Kelln v. Stevens*, 2006 BCCA 278 [Morey].
- [10] *Bates v. Stubbs* was a case where the defendant applied pursuant to Rule 30(1) [now Rule 7-6(1)] for an order that the plaintiff attend for an independent medical examination. In allowing the appeal from a chambers judge, Aikins J.A. quoted the chambers judge who concisely summarized the positions taken by counsel for the parties and the issue involved as follows at para. 2:
- The plaintiff raises no objection to such examination and requests a copy of the examining doctor's report. The defendant is quite prepared to furnish this copy on the plaintiff agreeing to turn over copies of all his medical reports. The only point in issue between the parties is whether the plaintiff is required to turn over all his medical reports or only those upon which he proposes to rely at trial.
- [11] This case, I believe, is easily distinguishable on its facts from the case at bar.
- [12] In *Nikolic v. Olson*, the issue before the court was whether our court had jurisdiction to order a litigant to authorize a third party resident in another province to produce his or her records (relating to that litigant) to another litigant.
- [13] *Mayer v. Mayer*, among other things, was about relevant documents at the two paragraphs cited by the defendants and discussed general principles related to document production. Accordingly, it is of no assistance to the case at bar.

- [14] Arpeg Holdings Ltd. v. Vancouver (City) is a short seven paragraph judgment by Nemetz C.J.B.C which involved an appeal from a chambers judge who ordered the defendant city to produce a report to the plaintiff prepared for the defendant by an agricultural consultant, but refused to order the production of two other reports.
- [15] The report ordered produced was prepared by the defendant's expert after the city obtained permission to enter the plaintiff's land in order to perform tests of its soil. Three different reports were generated for the defendant city and the plaintiff asked for all three reports to be produced. The city claimed privilege over all three reports.
- [16] The chambers judge allowed the production of one of the three reports and the plaintiff appealed in the hope of having the other two reports produced.
- [17] In dismissing the appeal on other grounds, the learned Chief Justice discussed the guiding rule, which, at the time, was Rule 30(4) [now Rule 7-6(4)] which provided at para. 5:
- (4) Where the Court considers it necessary or expedient for the purpose of obtaining full information or evidence, it may order the production, inspection, and preservation of any property and authorize samples to be taken or observations to be made or experiments to be conducted on or with the property.
- [18] The learned Chief Justice went on to say that in his opinion, "the rule clothes the judge with the discretionary power to abrogate the rule of privilege in respect of an expert's report. Indeed, Justice Nemetz was correct in his interpretation of that Rule, however, I am of the view that that Rule does not apply in the case at bar.
- [19] Morey v. Lemon was an appeal where the issue was whether as a condition of an order for an independent medical examination of a plaintiff under Rule 30(1)(b) of the Supreme Court Rules, the defendant should be required to obtain and disclose to the plaintiff the medical opinion of the examining physician.
- [20] In allowing the appeals in Morey, the Court of Appeal overruled Inhoff v Irwin, 2005 BCSC 280, and said this at para. 14:

Rule 30(1) is worded in permissive terms and it is intended to delegate discretion to the judge or master making an IME order at first instance. There may be special circumstances in any particular case that would justify the exercise of discretion to order more disclosure than contemplated by the Stainer order, but not as a term of general application in the absence of special circumstances. No such special circumstances are evident in the cases at bar.

- [21] Contrary to the Applicant's position, the plaintiff maintains that there is a distinction between test results from a test commissioned by the plaintiff's counsel and information given to an expert by the plaintiff during an examination under the Rules. The plaintiff further submits that the issue of the test data of an expert retained by the plaintiff, which is the issue in the case at bar, is different from the cases of Stainer and Gulamani, which were cases that dealt with the plaintiffs being ordered to attend defence medical examinations.

[22] The plaintiff says the information given by the plaintiff to the defendant's experts in Gulamani was not privileged since she provided that information herself. However, where the plaintiff provides factual data and results to an expert retained by her counsel solely for the purpose of the litigation, that information is protected by privilege until such time, if ever, that she elects to rely on that expert at trial.

[23] At the heart of the plaintiff's opposition to the application is the concept of solicitor's brief privilege as discussed by Chief Justice McEachern in *Hodgkinson v. Simms*, [1988] B.C.J. No. 2535, where at p. 5, he said:

While I favour full disclosure in proper circumstances, it will be rare, if ever, that the need for disclosure will displace privilege.

In my view it is highly desirable to maintain the sanctity of the solicitor's brief which has historically been inviolate. The cases are replete with explanations for such a privilege.

[24] The plaintiff relies on a number of cases to invoke solicitor's brief privilege to oppose the application, including *Lanteigne v. Brkopac*, 2011 BCSC 1303; *Galvon v. Hopkins*, 2011 BCSC 1835; *Nowe v. Bowerman*, 2012 BCSC 1723; and *Blackwell v. Kwok*, 2013 BCSC 246.

[25] In *Lanteigne*, the applicant defendant and third party sought the notes and raw test data from the plaintiff's doctor to whom the plaintiff was referred by her counsel. They submitted that the doctor has made observations or findings on examination of the plaintiff and to that extent the doctor has become a potential witness as to matters of fact, and since there can be no property in a witness, the doctor's notes of the examination should be producible by court order.

[26] The issue in *Lanteigne* was framed thus: can a defendant or third party who has not obtained a doctor's report by compulsion of a court order, and prior to disclosure of any medical-legal reports by the plaintiff or in the absence of any reports, obtain access to the non-treating doctor's notes and clinical findings, or are the said notes and clinical records privileged as forming part of the brief of the plaintiff's solicitor until the time when the plaintiff chooses to rely on the non-treating doctor as a witness at trial and the doctor's notes must be disclosed.

[27] However, the defendant in *Lanteigne* was not seeking the testing data because it could not be produced by the defendant's own expert, but because to do so would be costly, and, accordingly, sought the court's assistance by seeking an order that the records of the plaintiff's neuropsychologist be produced and thus save them the cost of proceeding with the other alternatives. Therefore, the court in *Lanteigne* found the applicants had not shown any meritorious reason for abrogating the plaintiff's litigation privilege related to the information provided by the plaintiff's neuropsychologist.

- [28] In *Galvon*, an appeal from a master, Madam Justice Kloeckman upheld the solicitor's brief privilege when she allowed the appeal where the master had ordered the disclosure of the plaintiff's experts at the Case Planning Conference. In doing so, she said at para. 24:
- [24] By requiring the plaintiff to disclose the very fact of her attendance before a medical expert, and run the risk of an adverse inference if she did not call the expert at trial, the master was also interfering with the plaintiff's right to elect which witnesses to call. Such interference is not sanctioned, nor warranted by our Supreme Court Rules.
- [29] In *Nowe v. Bowerman*, the issue before Dickson J. was whether on a defence application at a case planning conference the court should compel the plaintiff to disclose the areas of expertise of the plaintiff's proposed experts by a certain date well in advance of the 84-day deadline for delivery of expert's reports prior to trial.
- [30] Madam Justice Dickson considered *Galvon* (supra) and made the following points in dismissing the defence application:
- [10] The area of expertise of an intended expert witness is a matter of trial strategy. Trial strategy is a key component of a solicitor's brief. It may well evolve as plaintiff's counsel builds a case and makes decisions based upon a myriad of factors and considerations. Intentions may change as the process unfolds over time.
- [11] In my view, unless and until the intention to rely upon a particular expert in a particular field is declared by delivery of a report in accordance with the timelines established by the Rules, in the absence of a compelling reason an early incursion into this aspect of the solicitor's brief will not be justified.
- [31] Thus, while protecting the solicitor's brief by privilege, Dickson J. expressed the view that there may be a circumstance in a case which is so compelling that the court could make an order to breach the solicitor's brief privilege. She did not provide examples of what she thought might be a compelling reason to make the incursion into the privilege however.
- [32] In *Blackwell v. Kwok*, Justice Funt refused the defence request at a case planning conference held in December 2012, to order the plaintiff to advise the defendants as soon as the plaintiff obtains the expert report of a psychiatrist or psychologist and decides to rely upon the expert for a trial which was scheduled for the latter part of 2014. The defendant's rationale for making the application was due to the difficulty in retaining experts in these fields even within a year of trial let alone 42 days before trial in order to obtain a rebuttal report.
- [33] In arriving at his decision, Funt J. considered *Hodgkinson v. Simms* (supra) as well as *Nowe v. Bowerman* (supra). At para. 14 of his decision he said:
- [14] Not surprisingly, I cannot state matters better than Chief Justice McEachern in *Hodgkinson*: "While I favour full disclosure in proper circumstances, it will be rare, if ever, that the need for disclosure will displace privilege."

- [34] There certainly was no compelling reason or proper circumstance in Lanteigne to breach the plaintiff's brief privilege, and I especially find in the case at bar the rationale "to be of the most assistance to the court" is not a compelling reason to breach the solicitor's brief privilege. Nor is there a special circumstance as suggested in *Morey v. Lemon*.
- [35] In my view, the cases cited by the plaintiff stand for the proposition that solicitor's brief privilege is inviolate unless or until the Applicant can show special or compelling circumstances that would allow the court to breach the sanctity of the privilege. No circumstances were provided in this case.
- [36] Accordingly, the application is dismissed with costs to the plaintiff in any event of the cause but not forthwith.

"Master Taylor"

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