

CANADA / JUDGMENT

Kang v. Sahota

2020 BCSC 828

COURT

Supreme Court of British Columbia

DECIDED

4 June 2020

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2020 BCSC 828 Kang v. Sahota

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kang v. Sahota,

2020 BCSC 828

Date: 20200604

Docket: M204030

Registry: New Westminster

Between:

Simratpal Kang

Plaintiff

And:

Malkit Singh Sahota

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiff:

B.J. Yu

Counsel for the Defendant:

J.A.S. Gill

Date of Written Submission:

May 28, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 4, 2020

- [1] This is an application by the defendant for production of documents.[1] Specifically, in an action for damages from personal injuries arising out of a motor vehicle collision, the defendant applies under Rule 7-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 for an order requiring the plaintiff to provide (i) Ministry of Health medical services plan ("MSP") records and (ii) Ministry of Health Pharmanet patient records, copies of which are in the possession of plaintiff's counsel.
- [2] The plaintiff opposes the application on two bases. First, the plaintiff says the defendant has not made a properly framed and particularized demand such that the plaintiff cannot properly respond and the court cannot properly assess the relevance of the records. Second, the plaintiff submits that the copies of the records in possession of plaintiff's counsel are protected by litigation privilege as part of his solicitor's brief.
- [3] There are at least two sub-rules under which the defendant could have made a demand for the material in question, namely Rule 7-1(10) or Rule 7-1(11). Each of these sub-rules has a different scope or test of relevance, as discussed in *Kaladjian v. Jones*, 2012 BCSC 357 at para. 49-50. Demands under Rule 7-1(10) are focused on documents that could be used to "prove or disprove a material fact" as contemplated in Rule 7-1(1)(a), whereas demands under Rule 7-1(11) are directed at documents that "relate to any or all matters in question in the action". The scope of the latter provision is broader, and is generally considered to engage the second of the two-tiers of relevance contemplated in the Rules. However, in addition to being broader in scope, Rule 7-1(11) also contains a requirement for the party making the demand to particularize the theory of relevance and to outline the factual or evidentiary basis for that theory.
- [4] I do not accept the contention that the application should be dismissed because the defendant has failed to make an express demand or properly particularize the request. In his initial correspondence, counsel for the defendant expressly requested post-collision MSP and Pharmanet records in the possession of plaintiff's counsel on the basis that they could be used at trial to prove or disprove a material fact and thus had to be listed under Rule 7-1(1). In subsequent email correspondence, defendant's counsel also invoked the second tier of relevance, expressly citing Rule 7-1(11). Defendant's counsel also articulated a specific "line of inquiry" to which the documents would be relevant, namely the plaintiff's assertion in examination for discovery that he "refused to take certain medications to treat his injuries".

[5] Thus, while no formal demand for documents was made under Rule 7-1(10) or (11), counsel for the defendant identified the documents in issue and made repeated requests for their production. Counsel cited the applicable sub-rules and also articulated a theory of relevance supported by case-specific facts grounded in the record. In response to repeated requests for production of the documents, plaintiff's counsel made it clear that he did not intend to produce them. In these circumstances, the defendant was entitled to bring an application under Rule 7-1(13) for an order requiring production of the documents in issue.

[6] Moving on to address the issue of relevance, I am guided by the following passage from *Global Pacific Concepts Inc. v. Owners of Strata Plan NW141*, 2011 BCSC 1752 at para. 9:

The question is whether a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a line of inquiry, or if it may have either of those two consequences. Therefore, it is acknowledged that the initial disclosure under Rule 7-1(1) relates to a materiality requirement, but that a party can apply to the court, as the defendant did here, for broader disclosure pursuant to Rule 7-1(14).

[7] Applying that test in the instant case, the question is whether the post-collision MSP and Pharmanet records in the possession of plaintiff's counsel could be used by either party to prove or disprove a material fact as contemplated in Rule 7-1(1) and (10), or alternatively would be relevant to one or more "matters in question" in the action as contemplated in Rule 7-1(11). As noted, the defendant has articulated at least one "line of inquiry" to which the documents could be said to relate, that being the plaintiff's assertion in examination for discovery that he refused to take certain medications to treat his injuries. Thus, I have no difficulty concluding that the defendant has met the "low" evidentiary threshold required to establish the relevance of these post-collision MSP and Pharmanet records under Rule 7-1(11). See *Hurley v. Baldo*, 2016 BCSC 1605 at para. 29, 32.

[8] The plaintiff's supporting affidavit states that the MSP records consist of "a number of billing codes" and the Pharmanet records list the plaintiff's "prescribed medications". On these rather benign descriptions, there is no concern that the plaintiff's privacy interests outweigh the right of the defendant to disclosure of otherwise relevant information, nor is there any concern that disclosure would offend the proportionality principle as discussed in *Marsh Canada Limited v. BFL Canada Insurance Services Inc.*, 2014 BCSC 1171 at para. 66.

[9] That brings me to the plaintiff's claim that what is sought in this application, namely copies of the MSP and Pharmanet records in the possession of plaintiff's counsel, are protected by privilege because these materials are part of the "solicitor's brief". In support of this position, plaintiff's counsel filed an affidavit from a legal assistant attesting that in personal injury actions such as this one, counsel's practice is to obtain copies of the client's MSP and Pharmanet records, which counsel then uses to determine what medical records and reports to obtain for the purposes of proving the plaintiff's case. Having obtained and used the plaintiff's MSP and Pharmanet records in this matter, counsel then listed them as privileged

documents in Part 4 of the plaintiff's list of documents.

- [10] Where a lawyer exercises professional judgment and industry in assembling a collection of relevant documents for the purposes of advising or conducting anticipated litigation, the lawyer is entitled to claim privilege over that collection of documents: *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (C.A.) at p. 142. Applying that reasoning in the case at bar, I am bound to conclude that the copies of the MSP and Pharmanet records in the possession of plaintiff's counsel are indeed part of the solicitor's brief and thus protected by litigation privilege. However, for reasons explained below, dismissing the defendant's application on the basis that the documents in question are privileged is very likely a hollow remedy.
- [11] In opposing the privilege claim, counsel for the defendant maintains that the documents in question - MSP and Pharmanet records - were not created for the dominant purpose of litigation. The original MSP and Pharmanet records were presumably created and maintained by the Ministry of Health, for purposes entirely unrelated to the conduct of this litigation. However, the point made by plaintiff's counsel is that the copies of these records obtained and kept within his file were assembled by him for the purpose of conducting the litigation. This makes the documents in question, namely copies of the MSP and Pharmanet records within counsel's file, part of the solicitor's brief.
- [12] Of course, the privilege only applies to the copies held by plaintiff's counsel. The original MSP and Pharmanet records, created and maintained by the British Columbia Ministry of Health, would not be protected by any privilege.
- [13] I am therefore bound to conclude that the plaintiff's position, though technical, is well founded in law. Practically speaking, I would consider counsel's claim of privilege to be of little utility, since the information in the MSP and Pharmanet records exists independently of the solicitor's brief. The defendant would presumably be free to seek production of the plaintiff's post-collision MSP and Pharmanet records directly from the Ministry of Health under Rule 7-1(18).
- [14] The defendant's application for production of post-collision MSP and Pharmanet records in possession of plaintiff's counsel is dismissed on the basis that the documents sought are protected by litigation privilege. In the circumstances, I make no order with respect to costs.

"Riley J."

- [1] This application is being dealt with by written submissions pursuant to a Practice Directive issued by the Chief Justice on 27 April 2020, entitled COVID-19: Expansion of Civil and Family Matters - Applications by Written Submission, and indexed as COVID-19 Notice #14.

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