

CANADA / JUDGMENT

Prothero v. Togeretz

2015 BCSC 764

COURT

Supreme Court of British Columbia

DECIDED

8 May 2015

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2015 BCSC 764 Prothero v. Togeretz IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Prothero v. Togeretz, 2015 BCSC 764 Date: 20150508 Docket: M146349 Registry: New Westminster Between: Adam Prothero Plaintiff And Cameron Togeretz and Walter-Joseph Togeretz Defendants Corrected Judgment: The front page of the judgment was corrected on May 12, 2015 Before: Master Caldwell In Chambers Reasons for Judgment Counsel for the Plaintiff: J.S. Voss Counsel for the Defendants: R.F. Shirreff Place and Date of Hearing: New Westminster, B.C. April 30, 2015 Place and Date of Judgment: New Westminster, B.C. May 8, 2015

- [1] This is an application by the defendants for production of an MRI disk listed as privileged document #4.1 on the plaintiff's List of Documents. Other orders relating to the plaintiff's attendance at a defence medical examination with Dr. Winston Gittens were dealt with at the time this matter came on for hearing.
- [2] The plaintiff was involved in a motor vehicle accident in November of 2010. Liability for the accident has been admitted but the cause and quantum of damages are contested.
- [3] The plaintiff has been under the care of his GP Dr. Fernandes since the accident. In August of 2011 Dr. Fernandes, as the plaintiff's treating physician, wrote to plaintiff's counsel indicating that the plaintiff needed to have an MRI done. The stated reasons for that procedure related to investigation and referral to a specialist for assessment, rehabilitation and ongoing management of symptoms.
- [4] A private MRI service was retained to perform the MRI due to Dr. Fernandes' concern that a two year wait could be expected in the public system.
- [5] Plaintiff's counsel requested of the ICBC adjuster that the corporation pay for the private MRI. I was told that that request was refused. There is correspondence attached to the affidavit of Lisa Gauthier which appears, from its date, to relate to this refusal but that letter is marked "Without Prejudice" and as no argument was presented to me regarding that letter I have not read it.

- [6] The MRI exam was performed on October 11, 2011. The resulting reports were provided to Dr. Fernandes and have been produced; the actual disk of the exam was provided to plaintiff's counsel.
- [7] On October 21, 2011 Dr. Fernandes wrote to Dr. A. Mutat, a neurosurgeon, requesting that he see the plaintiff. On that same date Dr. Mutat wrote back to Dr. Fernandes with an appointment for the plaintiff to attend his office on November 3, 2011. In that letter, Dr. Mutat specified that "Patients whom have had private MRI's are to bring their CD of the imaging to their appointment."
- [8] On November 3, 2011 Dr. Mutat reported back to Dr. Fernandes regarding the plaintiff's attendance in his office that day. In that letter Dr. Mutat refers to the imaging and uses additional language to that found in the MRI reports themselves. From this I conclude that Dr. Mutat did in fact view the contents of the MRI disk and used those contents in coming to his conclusion as communicated to Dr. Fernandes.
- [9] Sometime later, I believe in December of 2011, plaintiff's counsel contacted Dr. Mutat in order to retain him as an expert to assist in the prosecution of the plaintiff's case.
- [10] On the material before me I am unable to agree with plaintiff counsel's assertion of litigation privilege or solicitor's brief privilege. It appears clear on the material that the MRI was requested by Dr. Fernandes as part of his course of investigation and treatment of the plaintiff for injuries resulting from the motor vehicle accident; he then obtained the results and referred the plaintiff to a specialist for further assistance in diagnosis and treatment. Dr. Mutat was a treating doctor at the time this took place and only took on the role of expert at a later date when approached by plaintiff's counsel.
- [11] In the result, the MRI disk is producible and is ordered produced; it came into existence for diagnostic and treatment purposes at the request of Dr. Fernandes, not for litigation purposes at the instance of plaintiff's counsel. In this regard it would seem that the cost of the MRI will be addressable as a special damage matter relating to medically necessary investigation and treatment rather than as a disbursement in the litigation however that will remain to be determined in the fullness of time.
- [12] Costs will be in the cause. Master Caldwell

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