
CANADA / JUDGMENT

Vlastic v. Fleming

2019 BCSC 1735

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1735 Vlastic v. Fleming

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vlastic v. Fleming,

2019 BCSC 1735

Date: 20191010

Docket: M168947

Registry: Vancouver

Between:

Katarina Vlastic

Plaintiff

And

Christopher William Fleming

and Gail Maureen Fleming

Defendants

Before: Master Elwood

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff:

M. Neckelman

Counsel for the Defendants:

M. Liechti

Place and Date of Hearing:

Vancouver, B.C.

September 24, 2019

Place and Date of Judgment:

Vancouver, B.C.

October 10, 2019

I. INTRODUCTION

- [1] The defendants apply for an order requiring a hospital to produce medical records relating to the late mother of the plaintiff, or, in the alternative, an order requiring the plaintiff to sign an authorization for the release of those medical records by the hospital.
- [2] As far as counsel have been able to determine, this is the first instance of an application in a personal injury claim for production of medical records of a person who is not a party to the action.
- [3] The plaintiff opposes the application on a number of grounds, including the fact that the defendants have not given notice to the estate, relevance, proportionality and the personal privacy interests of her late mother.
- [4] For the reasons which follow, I have concluded that the documents should be produced, but on limited grounds using an order in the form suggested in *Halliday v. McCulloch* (1986), 1 B.C.L.R. (2d) 194 (C.A.).

II. BACKGROUND

- [5] The plaintiff, Katarina Vlastic, seeks damages arising from injuries suffered in a motor vehicle accident on November 30, 2014. The defendants admit liability for the accident.
- [6] Ms. Vlastic is 55 years old. She is an elementary school teacher in the Abbotsford public school system, where she specializes in visual arts.
- [7] In the original notice of civil claim filed on November 15, 2016, Ms. Vlastic alleged injuries to her neck, shoulders and back, a loss of mobility, sleep disturbance and chronic pain.

- [8] Initially, Ms. Vlastic did not take much time off work following the accident. Over time, however, the injury to her back developed into chronic pain and a convergence of physical and psychological ailments. In September 2018, Ms. Vlastic took an extended medical leave from work. She attempted a graduated return in January 2019, without success. She is currently off work.
- [9] On March 22, 2019, Ms. Vlastic amended the notice of civil claim to add claims of anxiety and depression resulting from the accident.
- [10] The defendants allege that any injury, loss or damage Ms. Vlastic incurred was not caused by the accident, but rather by pre-existing conditions and other factors in her life. The defendants seek to establish that the downturn in Ms. Vlastic's psychological well-being and medical leave from work in 2018 were caused in whole or in part by the stress of caring for her aging mother, compounded by pre-existing depression and anxiety.
- [11] The defendants rely on a report by William Koch, Ph.D., a registered psychologist. Dr. Koch was retained by the plaintiff's counsel to conduct a psychological assessment of Ms. Vlastic and provide an opinion on her current mental health problems, symptoms and diagnosis. Dr. Koch conducted the assessment on October 23, 2018, not long after Ms. Vlastic took the medical leave from work.
- [12] According to the history set out in Dr. Koch's report, Ms. Vlastic was exposed to domestic violence as a child and the adverse effects of her parents' troubled marriage. Her father was physically violent with Ms. Vlastic and her mother. When Ms. Vlastic was a teenager, her mother was diagnosed with bipolar disorder.
- [13] Despite these challenges at home, Ms. Vlastic was a good student. She attended UBC, obtained a B.Ed. in 1987, and secured a teaching position. She later attended the Emily Carr School of Art and Design, and obtained an M.Ed. from UBC.
- [14] At age 23, Ms. Vlastic was involved as a passenger in a motor vehicle accident and spent 10 to 14 days in hospital. Following this accident, Ms. Vlastic felt depressed and missed work for about a month.
- [15] In or about 1996, Ms. Vlastic took a medical leave from work to address depression resulting from the end of a romantic relationship and her mother's mental health.
- [16] In 2012, two years prior to the accident, Ms. Vlastic sought treatment from her family doctor for symptoms of depression and sleep problems. In 2014, four months prior to the accident, Ms. Vlastic reported anxiety to her doctor around issues at work. Two months before the accident, Ms. Vlastic requested a note from her doctor to document her anxiety.

- [17] Ms. Vlasic reported to Dr. Koch in 2018, four years after the accident, that she felt severely depressed about half the time, and that she worried a great deal about work and her health, especially the pain. She also reported worrying excessively about her mother and her mother's long-standing health problems. Ms. Vlasic dated these worries from her childhood, but noted that her concern about her own pain arose following the accident in 2014.
- [18] Dr. Kohn diagnosed Ms. Vlasic with a major depressive disorder, somatic symptom disorder (chronic pain), post traumatic stress disorder and generalized anxiety disorder. In Dr. Koch's opinion, the accident in 2014 precipitated Ms. Vlasic's current depression, chronic pain and PTSD, to which her history of trauma and depressive episodes made her more vulnerable than the average person. Further, in Dr. Koch's opinion, Ms. Vlasic suffered from a generalized anxiety disorder for many years pre-dating the accident.
- [19] The defendants also rely on session notes by Lorne Pierce, a registered psychologist, from whom Ms. Vlasic received counseling in late 2018 and early 2019. At a session on December 10, 2018, Mr. Pierce noted anxiety in Ms. Vlasic concerning the attempted return to work, and observed that Ms. Vlasic seemed "a bit scattered" and, in her words, "filled with nervous energy". Ms. Vlasic told Mr. Pierce that she cared for her ailing mother who was in a home in Vancouver, and that she often needed to become directly involved in her mother's care, and, if she was not around, her mother sometimes threatened suicide.
- [20] At a session on January 9, 2019, Mr. Pierce noted that Ms. Vlasic talked about the need to work on past trauma and the stress of visiting her mother and the need to establish boundaries for herself.
- [21] Ms. Vlasic was examined for discovery in this action on October 11, 2017, and February 12, 2019. On the first day of her discovery, Ms. Vlasic acknowledged a cycle of depressive episodes beginning when she was 17 years old, and most recently when she was in her 30s. Ms. Vlasic also acknowledged that her symptoms of depression and anxiety could be connected to her mother and when her mother was not well.
- [22] On the second day of discovery, Ms. Vlasic testified that her mother had suffered through a number of health issues affecting her own life, including cancer, heart surgery, a blood clot, a broken hip and issues with medication. Ms. Vlasic also described difficult episodes in her past involving her mother's mental health, when her mother became manic and required police intervention and committal under the Mental Health Act. At the time of the accident, however, Ms. Vlasic testified, she felt that she "had it together", having acquired the skills and the strength to manage her mother's health issues and ensure that she received the care she deserved. It was only following the accident, Ms. Vlasic testified, that she developed "a kind of nervous energy" and relapsed into the depression from which she had felt clear for 15 years or more.

- [23] Ms. Vlastic's mother, Martha Vlastic, was a full-time resident at Holy Family Hospital at the time of her daughter's accident in 2014, and remained in care at Holy Family until the mother's death. In or about July 2018, at the request of Holy Family, Ms. Vlastic retained Bayshore Home Health and a private care aid to provide additional support and companionship for her mother.
- [24] Ms. Vlastic denies that the additional companion care starting in July 2018 was required because her mother was in declining health. The main emphasis of the companion care, she states, was social interaction and limited assistance with daily activities. Ms. Vlastic further denies that her mother's health declined throughout 2018 and 2019.
- [25] Martha Vlastic died on April 16, 2019.

III. ANALYSIS

- [26] The defendants rely on Rule 7-1(18) of the Supreme Court Civil Rules, which provides that:
- (18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:
- (a) production, inspection and copying of the document;
- ...
- [27] In *Kaladjian v. Jose*, 2012 BCSC 357, Mr. Justice Davies held that Rule 7-1(18) must be procedurally and substantively interpreted and applied in a manner consistent with Rules 7-1(10) to (14), with necessary modification to ensure protection of the independent interests of third parties whose records are sought (para. 53). Pleadings determine relevance, but some evidence will be required to support an application for additional documents when the application is brought under this Rule (para. 62). Orders requiring document production from third parties must also comply with the objective of proportionality (para. 65).
- [28] In *Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673, Mr. Justice G.C. Weatherill held that:
- [81] It is apparent from the wording of Rule 7-1(18) that it was not intended to provide broad discovery of documents from non-parties, but rather a mechanism by which parties can access specific documents or classes of documents when it has been demonstrated that they are in the possession or control of a non-party and are relevant to an action.
- [29] The defendants in this case seek production of documents in the possession or control of Holy Family Hospital relating to Martha Vlastic from January 2018 to April 16, 2019. This request gives rise to issues concerning the notice requirements under Rule 7-1(18), whether the defendants have demonstrated sufficient relevance of the documents sought, proportionality and personal privacy.

A. Notice Requirements

- [30] The defendants served Ms. Vlastic and Holy Family Hospital with notice of the application. Holy Family Hospital advised counsel for the defendants that it will comply with a court order or an authorization from Ms. Vlastic for production of the records, and takes no position on whether an order should be granted.
- [31] The defendants did not serve the estate of Martha Vlastic.
- [32] Rule 7-1(18) itself does not require notice to the estate. Rule 7-1(18) only requires notice to the person in possession or control of the documents and the parties of record in the action.
- [33] Rule 8-1(7), however, requires that an application be served on every person, other than a party, who may be affected by the order sought. Plaintiff's counsel submits that the failure to serve the estate in this case is fatal to the application.
- [34] The Interpretation Act, R.S.B.C. 1996, c. 238, defines "person" to include "legal representatives of a person to whom the context can apply according to law". Arguably, therefore, assuming that Rule 8-1(7) applies, notice to the personal representative of an estate, if one has been appointed, is required when an order may affect the privacy interests of the deceased. Counsel were unable to advise the court whether a personal representative has been appointed to represent the estate of Martha Vlastic.
- [35] In my view, assuming again that Rule 8-1(7) applies, and assuming a personal representative has been appointed, the defendants' failure to serve that person should not be fatal to this application. The record shows clearly that the plaintiff, Ms. Vlastic, advocated for her mother and had the legal authority to retain and instruct her caregivers prior to her death. Holy Family Hospital will accept an authorization from Ms. Vlastic to release medical records of her late mother. In other words, the hospital acknowledged Ms. Vlastic to be a legal representative of her late mother, before and after her death. Further, Ms. Vlastic was directly involved in her mother's care prior to her death, and should be knowledgeable of the contents of her medical file. Ms. Vlastic advanced submissions on this application defending the privacy interests of her late mother. It is not clear to me what a representative of the estate could add to Ms. Vlastic's submissions.
- [36] I conclude that, if notice is required to the estate of Martha Vlastic, notice to the plaintiff Ms. Vlastic is, in the circumstances of this application, sufficient for that purpose.

B. Relevance

- [37] The defendants argue that the medical records of Martha Vlastic from January 2018 to April 16, 2019, are relevant to the cause of the Ms. Vlastic's damages. The defendants note that Ms. Vlastic did not take medical leave from work until September 2018, almost four years after the accident in question. The cause of her disability, they submit, remains unclear and could relate to a decline in her mother's health and the stress of caring for a dying family member.

- [38] Ms. Vlasic argues that medical records of her late mother are not relevant to her own mental health. Those records will not contain any direct evidence of how Ms. Vlasic was affected by her mother's health. Ms. Vlasic's argument is that her chronic pain syndrome and related anxiety and depression developed over time as a result of the accident. There will be no evidence, she submits, in the documents sought that her condition was caused by her mother's health issues.
- [39] I agree with Ms. Vlasic that it is unlikely the medical records of her late mother contain information that would provide direct evidence of her own mental health. However, that does not mean the defendants have failed to demonstrate that the documents are relevant.
- [40] During the material period of time from September 2018, when she took leave from work, to March 2019, when she amended her notice of civil claim to allege anxiety and depression resulting from the accident, Ms. Vlasic told Dr. Koch and her therapist that she was experiencing stress caring for her mother. The evidence also links past depressive episodes Ms. Vlasic experienced to the effect on her of her mother's health issues. There is a theme in the evidence of worry and anxiety about her mother's health. While Ms. Vlasic testified on discovery that she developed skills and coping mechanisms, the defendants should be entitled to test that self-analysis with evidence from the critical period of time.
- [41] The medical records will likely provide evidence of Ms. Vlasic's knowledge of her mother's medical condition during the material period of time. The medical records will likely document when Ms. Vlasic visited her mother, discussions between hospital staff and Ms. Vlasic and instructions from Ms. Vlasic concerning her mother's care. The medical records will also likely document discussions between the hospital and Ms. Vlasic about the additional companion care for her mother in July 2018. Finally, the medical records will likely document the cause of death, whether Ms. Vlasic was at her mother's bedside when she passed away or how Ms. Vlasic was notified of her mother's death.
- [42] In my view, these aspects of the medical records relate to a matter in question in the action, namely the cause of Ms. Vlasic's psychiatric injury and her inability to return to work. Even on the narrower definition of relevance under Rule 7-1(1), the above-referenced aspects of the medical records could be used by the defendants to prove or disprove material facts concerning causation and damages.
- [43] In short, I am satisfied that there is sufficient evidence before the court of the existence and potential relevance of information in the medical records of Martha Vlasic that, subject to proportionality and privacy concerns discussed below, an order should be made requiring the hospital to produce them.

C. Proportionality and Privacy Interests

- [44] Ms. Vlasic argues that the order sought will result in an unwarranted invasion of her mother's privacy. She relies on the following passage from Kaladjian:

- [73] The contents of a plaintiff's MSP records remain private unless it is established to the satisfaction of the court that an invasion of that privacy is necessary.
- [74] In my view, the defendant's submissions advocating the invasion of privacy interests by defendants "as of right" by reason only of a defence plea of a pre-existing condition, fails a proportionality analysis. Even when the information sought is as limited as that contained in MSP records, privacy rights should not be abridged without cogent reasons to do so.
- [75] Every individual's health and the medical treatment of it is a personal and private matter that should not be lightly interfered with. In today's world of medical specialization, disclosure of even the name of a medical professional consulted by an individual for reasons wholly unrelated to a defence plea of a prior existing condition is an unwarranted and unnecessary invasion of privacy. Privacy interests do not take second place to notions of expediency.
- ...
- [78] Involvement in an automobile accident does not amount to an implied waiver of privacy rights.
- [45] These words are instructive. The court should be even more concerned, in my view, when the application concerns the private medical records of a person who has not brought any claim against the defendants and cannot be said to have waived any right of privacy.
- [46] Context, of course, is important. Martha Vlasic is deceased. The extent of the invasion of her privacy must be considered in that context.
- [47] Adjudicators of the Office of the Information and Privacy Commissioner have consistently held that a person's privacy rights under the Freedom of Information and Privacy Act, R.S.B.C. 1996, c. 165 ("FOIPPA") continue after death, and only diminish over time to a degree that varies with the specific circumstances: see for example, Order F14-09, 2014 B.C.I.P.C. No. 11, at para. 13.
- [48] The court is not bound by FOIPPA principles on this application. Moreover, s. 33 of FOIPPA authorizes a public body like the hospital to produce personal information for the purpose of complying with a court order. Nonetheless, the concept under FOIPPA of personal privacy surviving death, sometimes for 20 or 30 years, is informative. In accordance with the objective of proportionality in the Rules, the court must strike a balance between the probative value of the documents sought and the invasion of the privacy of the deceased.
- [49] Much of the information in the medical records of Martha Vlasic will have little or no probative value in this action. There is clearly personal information about the late Ms. Vlasic in her medical records. She has been dead for less than a year. She retains a privacy interest in her medical records.

- [50] The necessary balance may be struck, in my view, by limiting disclosure to the defendants to those aspects of the medical records which I have found relate to the matters in question in this action.
- [51] The order of this court will require Holy Family Hospital to produce a complete set of the medical records to counsel for the plaintiff. Given Ms. Vlastic's close relationship with her mother and her mother's health care, I consider the invasion of privacy at this first stage of production to be minimal. Counsel for the plaintiff will then review the medical records for relevancy based on these reasons for judgment. Only then will the relevant portions of the medical records be forwarded to counsel for the defendants.
- [52] In my view, disclosure under this process will not result in an unwarranted invasion of the privacy of the deceased.

IV. CONCLUSION

- [53] There will be order in Halliday format requiring the Holy Family Hospital to produce the medical records of Martha Vlastic from January 1, 2018, to April 16, 2019.
- [54] Counsel for the plaintiff may review the medical records produced by Holy Family Hospital and produce to the defendants only those documents or portions of documents which relate to the matters set out in paragraph 41 of these reasons for judgment.
- [55] The defendants will pay the reasonable expenses incurred by Holy Family Hospital to comply with this order.
- [56] The defendants are entitled to costs of this application in the cause.

"Master Elwood"

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