CITATION: Walsh v. Optimum, 2012 ONSC 3013
COURT FILE NO.: CV-817/10
DATE: 20120522

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Cindy Walsh	)	
Plaintiff	)	Patrick Poupore, for the Plaintiff
– and –	)	
Optimum Insurance Company Inc.	)	Jason Frost, for the Defendant
Defendant	)	
	)	**HEARD:** April 13, 2012

R.D. GORDON, J

RULING ON MOTION

Overview

[1] The Plaintiff has brought an action against the Defendant, her accident benefits insurer, for benefits she says are due under the Statutory Accident Benefits Schedule.

[2] The motion before me dealt with three issues:

(1) Whether the Plaintiff must appear for oral examination;

(2) Who is entitled to examine first; and

(3) From what point in time is the Defendant entitled to claim litigation privilege relative to documents in its possession.

Background Facts

[3] The Plaintiff was involved in a motor vehicle accident on January 20, 2006. She subsequently made application to the Defendant for accident benefits. The Defendant denied various claims made by the Plaintiff and there ensued a request for mediation made to the

Financial Services Commission of Ontario dated September 28, 2009. The mediation was conducted on April 7, 2010 and June 15, 2010 but was unsuccessful. The Plaintiff issued her claim on July 27, 2010 and service on the Defendant was made on August 19, 2010. A Notice of Intent to Defend was served on August 31, 2010 along with a letter requesting an indulgence for the filing of a Statement of Defence. The Statement of Defence was eventually served on March 21, 2011.

[4] The Plaintiff's claim, if successful, would amount to several hundred thousand dollars. She has included a claim for $500,000 for breach of duty to act in good faith.

Must the Plaintiff Attend for Oral Examination?

[5] Each party has the prima facie right to examine an adverse party in order to fully understand, assess and defend the allegations which are being made. The examination process is one that must be anticipated by parties when they enter into litigation of this nature. It is a right and an obligation that is not easily cast aside.

[6] In certain rare circumstances, the court has discretion to excuse a party from attendance on oral examination and to require instead that he or she submit to examination by written questions.

[7] Written examination, however, is a poor substitute because it allows the party being examined an opportunity to know all of the questions before any answer is given, and to reflect and consult before answering. Written examination does not allow for spontaneity or questions arising from the answers. It does not allow the examiner the opportunity to "eyeball" the party and assess the sort of witness he or she will be in court.

[8] A significant tactical advantage accrues to the party that is required to submit only to written examination. As a result, the party wishing to avoid attendance for oral questioning bears the onus of providing persuasive and compelling medical evidence that such attendance is likely to result in significant psychological damage.

[9] In the case before me, Dr. Keith Klassen, a Rehabilitation Psychologist provided a letter to counsel for the Plaintiff dated May 17, 2011 in which he indicated that if Ms. Walsh were to attend for discoveries it should be noted that she:

(1) has extremely poor memory;

(2) under timed conditions is likely to become flustered and emotional to the point of not being able to answer anything and crying uncontrollably; and

(3) will suffer stress to the point of breakdown which will be damaging to her emotional state and rehabilitation progress.

[10] By further letter dated April 1, 2012, Dr. Klassen confirmed the continued applicability of the contents of his first letter and noted that "While her carrying out of routines is better, she still remains emotionally fragile, reactive and concrete. It is my current opinion that legal examinations will result in a very high level of emotional distress and decompensation that will harm her current psychological adjustment and interfere with ongoing rehabilitation progress."

[11] What is not clear from Dr. Klassen's letters is whether his opinion would differ if Ms. Walsh was offered significant accommodation designed to address the difficulties she may encounter. Indeed, it is not at all clear what Dr. Klassen's perception of the proposed examination for discovery process involves. The evidence before me establishes that counsel for the Defendant has significant experience in the examination of brain-injured persons. She understands and appreciates that Ms. Walsh may have difficulty remembering details, organizing her thoughts and answering questions. She has offered to conduct the examination over several days, take breaks as required, begin discoveries at a time of day most beneficial to the plaintiff, have a resource person available for emotional support, have a pad and pen available to the plaintiff so that she may write down details, ask simple questions, rephrase questions to ensure Ms. Walsh appreciates the nature of what is being asked, and accept the intervention of counsel for the Plaintiff to correct any answers that are incorrect and to follow up in writing as provided in Rule 31.09.

[12] It might also be noted that the evidence before me establishes that the plaintiff can participate in many activities of daily living, has completed (without assistance) an almost three hour medico-legal examination, and has seen considerable improvement in her ability to receive, process and understand information.

[13] In my view, the evidence adduced by the Plaintiff is not persuasive and compelling evidence that her attendance under conditions designed to accommodate her difficulties is likely to result in significant psychological damage. I have little doubt that counsel for the Defendant will be aware of and sensitive to those difficulties. Accordingly, it is ordered that the Plaintiff attend for examination for discovery subject to accommodation by the solicitor for the Defendant on the terms set out in paragraph 27 of her affidavit sworn April 9, 2012.

Who is Entitled to Examine First?

[14] Rule 31.04(3) provides that the party who first serves a Notice of Examination may examine first unless the court orders otherwise. Rule 34.04 provides that a party who seeks to examine for discovery may serve a notice of examination under Rule 34.04 only after the Defendant has filed a Statement of Defence and the examining party has served an affidavit of documents.

[15] In this case, the Defendant first served its sworn affidavit of documents and notice of examination and is presumptively entitled to examine first. The question which arises is whether the conduct of the parties was such as to displace this presumption.

[16] As I determined in the case of *Payzant v. The Bank of Nova Scotia* [2011] O.J. No. 239, when one of the parties has made it clear, either expressly or impliedly, that strict compliance with the rules is expected, it may reasonably look to those rules for assistance. When the parties have made it clear, either expressly or impliedly, that strict compliance with the rules is not

expected, it does not behove a party to assert non-compliance to gain advantage and the court should look to what was reasonably expected by the parties.

[17] Although in this case there was clearly an indulgence granted in allowing the Defendant to file a statement of defence outside the timeframes dictated by the rules, there were no conditions attached to that indulgence. There is conflicting evidence of whether Plaintiff's counsel attempted to arrange examinations prior to the delivery of the statement of defence. Plaintiff's counsel has provided an affidavit from a clerk swearing that several phone calls were made beginning in January of 2011 requesting dates for examinations and that they went unanswered. Defendant's counsel has sworn an affidavit that their document management system, which is designed to log and track all such requests, shows nothing until April 5, 2011. That is not an issue I can resolve without the benefit of cross-examination on the affidavits, however, it need not be resolved to address the larger issue.

[18] This case is significantly different than the situation in *Payzant*. In that case, the Plaintiff's indulgence to the Defendant was granted specifically on the basis that dates for examination would be set notwithstanding the delay in providing the statement of defence. Dates for examination were agreed upon and Notices of Examination served by both parties months before the Statement of Defence or any affidavit of documents was provided. Neither party complained of the manner in which the other was proceeding.

[19] In this case, there was no implied or express waiver of compliance with the rules relative to discovery. Coincident with the delivery of the statement of defence the defendant sought dates for examinations. After much discussion of dates and the Plaintiff's ability to attend, the defendant served a notice of examination on October 31, 2011, some 7 months after delivery of the statement of defence. It was not until three weeks later that the plaintiff, for the first time, served an affidavit of documents and notice of examination.

[20] In all of the circumstances, it is appropriate that the rules pertaining to examinations govern the parties. The result is that the defendant is entitled to examine the plaintiff first.

When does Litigation Privilege Arise?

[21] Litigation privilege applies to communications generated by a lawyer or client for the dominant purpose of litigation when such litigation is within the reasonable contemplation of the party asserting the privilege. It arises out of the adversarial system, the requirement for documentary production, and the notion that those before the court control the evidence that gets presented to the court about their case. It is generally accepted that parties must be free to investigate their cases, complete their research, draw their conclusions and map out their strategy without being compelled to make disclosure of same.

[22] The Defendant contends that because the Insurance Act mandates mediation as a precondition to litigation, the Plaintiff actually began litigation on the date of the Application for Mediation. In the alternative, the Defendant takes the position that litigation was within the reasonable contemplation of the Defendant upon receipt of that application.

[23] The Plaintiff argued that the application for mediation does not give rise to a realistic anticipation of litigation for the insurer because it is obliged to continue adjusting the file and dealing with the insured in good faith. In any event, it was argued that the insurer is still obliged to detail the documents over which it is claiming privilege and prove that the dominant purpose of the creation of such documents was in anticipation of litigation.

[24] In my view the application for mediation does not, in and of itself, amount to litigation such as would give rise to litigation privilege. This is because there is no requirement for documentary discovery and production as a precondition of the mediation. If there is no requirement for documentary discovery, there is no need to assert privilege. Accordingly, it is

only if the application for mediation amounts to a reasonable prospect of subsequent litigation that privilege would apply.

[25] I have no doubt that in many cases the application for mediation would give rise to a reasonable prospect of subsequent litigation. Such might be the case where the evidentiary record illustrates acrimony between the parties, allegations of bad faith which predate the application, diametrically opposed positions incapable of reconciliation or some other indicia that the mediation is but a step being undertaken largely to satisfy the precondition to litigation. However, where no such evidence is presented, an application for mediation is but a request for assistance in resolving issues which have arisen between two parties acting in good faith. In such situations, it is not appropriate to find a reasonable prospect of litigation.

[26] In this case before me, I have no evidence on point aside from the application for mediation and the report of the mediator. Those items alone do not form a sufficient basis to determine that litigation was within the reasonable contemplation of the Defendant when the application was filed. Accordingly, the Defendant's claim for litigation privilege does not properly begin at that time.

Costs

[27] If the parties are unable to agree on the issue of costs, they may make written submissions to me, not to exceed five pages in length each, within six weeks of the issuance of this decision.

"Justice R.D. Gordon"

R.D. Gordon, J

Released:
May 22, 2012

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