SUPREME COURT OF YUKON

Citation: *Stuart v. Doe*, 2021 YKSC 12

Date: 20210219
S.C. No. 18-A0102
Registry: Whitehorse

BETWEEN:

CHARLES STUART

PLAINTIFF
(DEFENDANT BY COUNTERCLAIM)

AND

JANE DOE

DEFENDANT
(PLAINTIFF BY COUNTERCLAIM)

Before Chief Justice S.M. Duncan

Appearances:
Gary W. Whittle — Counsel for the Plaintiff
George Filipovic — Counsel for the Defendant

RULING
(Application for production of medical records)

Introduction

[1] This is an application by the plaintiff/defendant by counterclaim ("Mr. Stuart") for production of medical and counselling records of the defendant/plaintiff by counterclaim ("Jane Doe"). It raises the need to balance the privacy interest in a litigant's health care records with the interest in the pursuit of truth and fairness in the conduct of the litigation.

[2] Jane Doe claims against Mr. Stuart for damages for sexual assault. The harms for which damages are claimed include: physical harm; nervous shock; emotional trauma; damaged self-esteem; acute and chronic psychological trauma; impaired social relationships; requirement for future counselling; stress and anxiety; generalized pain and suffering; and ongoing medical, psychiatric and psychological treatment.

[3] Mr. Stuart seeks production of records (chart, progress, file or clinical notes of all medical doctors, psychologists, treating caregivers) related to: Jane Doe's treatment and counselling received, including prescription drugs, for borderline personality disorder and post-traumatic stress disorder; her attendance at all hospitals since October 14-15, 2017 (the date of the alleged assault); any suicide attempts before and after October 14-15, 2017; any sexual assault or sexual battery she has allegedly suffered; and all of the specific harms claimed in the counterclaim. He says costs of producing the documents should be borne by Jane Doe and seeks costs of the application.

Issue

[4] To what extent and under what conditions should health care records of Jane Doe be ordered disclosed in a civil action for sexual assault? What is the appropriate balance between the privacy interest of the alleged victim and the benefits to society and fairness to the opposing party of resolving the litigation fairly? To what extent does waiver by the alleged victim through pleading harms and resulting damages, and through disclosing health information in other contexts affect the balancing of interests?

Background Facts

[5] This litigation was commenced by a defamation suit by Mr. Stuart arising from a Facebook post by Jane Doe about her state as a victim of sexual assault. A counterclaim was brought by Jane Doe alleging Mr. Stuart sexually assaulted her on October 14-15, 2017. There is no dispute there were sexual encounters between Mr. Stuart and Jane Doe. The issue is whether Jane Doe consented.

[6] This Court has ordered that the parties proceed with examinations for discoveries in the counterclaim, as all have agreed that consent is the main issue in this litigation. After discoveries, the Court has requested the parties return to case management to discuss the possibility of alternative dispute resolution. As a result, this application for disclosure of the health care records will be considered in the context of the counterclaim only at this time.

[7] The Court granted an anonymity order, a partial publication ban and a partial sealing order to Jane Doe in October 2019. It provides among other things that nothing shall be published that in any way identifies Jane Doe.

[8] In the application for the October 2019 order, counsel for Jane Doe submitted affidavit evidence. Attached as an exhibit to one of the affidavits was a [redacted] article dated [redacted], [redacted] days before the alleged assaults. The article had originally been disclosed by Mr. Stuart in his affidavit of documents. It featured comments by Jane Doe about the significant inadequacies of mental health/psychiatric treatment in the Yukon medical system. Jane Doe was reported in the article to have said she waited six months for an appointment with a psychiatrist and was diagnosed with borderline personality disorder and post-traumatic stress disorder.

[9] Jane Doe also included a letter from her treating psychologist in her application for the October 2019 order. The psychologist outlined the number of appointments she had with Jane Doe and opined about the harm she believed Jane Doe would suffer if her identity were made public.

[10] Jane Doe also deposed in her application for the October 2019 order that she was suicidal on October 31, 2018; a state she attributed to the publication (without disclosing her name) by the [redacted] of these proceedings, commenced by Mr. Stuart in October 2018.

[11] The parties were unable to agree on terms and scope of the health care records disclosure. Given the significant interests at stake, particularly in the context of a civil claim of sexual assault, the Court ordered this application be brought, rather than deciding the issue in case management.

[12] Oral discoveries are yet to occur. The existence of health care records of Jane Doe relevant to her claim for damages was referred to in her affidavit of documents but they have not been precisely identified. The request of Mr. Stuart is broad in the time spanned and the scope of documents requested, described in para. 3 above.

Arguments of the Parties

Mr. Stuart

[13] Mr. Stuart seeks disclosure of the health care records for the following purposes: credibility, liability, the nature, extent and effect of Jane Doe's alleged injuries and the appropriate measure of damages. He says the October 2019 order provides sufficient privacy protection to Jane Doe.

[14] Generally, Mr. Stuart relies on the cases of *Reischer v. Love*, 2005 BCSC 580, and *Glegg v. Smith & Nephew Inc.*, 2005 SCC 31, for the proposition that once a plaintiff puts their health in issue in a pleading, their right to confidentiality in health care records ceases.

[15] Counsel for Mr. Stuart did not provide case law directly in support of his claim that the records should be disclosed for the purpose of determining credibility and liability. His argument is that because Jane Doe voluntarily disclosed her diagnoses of borderline personality disorder ("BPD") and post-traumatic stress disorder ("PTSD") to the [redacted], he is entitled to any health care records reflecting this. His basis for the allegation about lying is two Wikipedia articles, an academic article, an online article and reference to expert testimony in the decision *G.(J.R.I.) v. Tyhurst*, 2001 BCSC 369 ("*G.(J.R.I.)*"), about BPD. One of the articles contains a suggestion that people with BPD have a propensity to lie.

[16] Counsel for Mr. Stuart relies on a number of cases in support of disclosure of health care records for the purpose of determining damages. For example, the Ontario Court of Appeal in *Cook v. Ip et al.* (1985), 22 D.L.R. (4th) 1("*Cook*"), a personal injury action, ordered disclosure of medical records from before and after the plaintiff's accident. Acknowledging the existence of privacy and confidentiality in medical records, the Court noted that the plaintiff's placing of his medical condition before the Court eliminated any privacy and confidentiality in those records. Without the records, it would be impossible for the defendant to determine the nature and extent of injuries and calculation of damages.

[17] Similarly, in *Clements v. Fougère*, 2007 NBCA 4, the New Brunswick Court of Appeal said:

> 48 … To put the matter bluntly, a plaintiff cannot sue for damages for psychological harm and then successfully block access to relevant therapeutic records by the formulation of unreasonable fears of production-related harms. Needless to say, the court can only conduct the required assessment if the basis for the plaintiff's fears is detailed in the evidence. …

[18] In this case, Mr. Stuart says Jane Doe has not provided any such evidence to substantiate fears of production-related harms. She has put her medical conditions at issue in her pleading and her affidavit evidence and he is entitled to any health care records related to these conditions.

Jane Doe

[19] Counsel for Jane Doe says the production request is too broad. He objects to the disclosure of any records that pre-date the alleged assault in October 2017 for two main reasons. First, he says Mr. Stuart has not pleaded pre-existing medical condition as a defence to the damages claimed (Rule 20(22) of the *Rules of Court of the* Supreme Court of Yukon, O.I.C. 2009/65 ("*Rules*"). Second, and in the alternative, even if Mr. Stuart had pleaded this, there is no "air of reality" to any argument that the harms suffered may have been caused by conditions pre-dating the alleged assaults.

[20] Counsel for Jane Doe relies on *Holmberg v. McMullen*, 2019 BCSC 1434, in which the Supreme Court of British Columbia refused to order disclosure or pre-accident medical records because no evidence was provided to support their production. There was no connection between the plaintiff's current conditions and disabilities and his pre-accident history. Similarly, the Supreme Court of British

Columbia in *Przybysz v. Crowe*, 2011 BCSC 731, refused to order the disclosure of records pre-dating the accident because the defendant's plea of pre-existing injury appeared to be *pro forma*, and there was no connection between the plaintiff's pre-existing and accident-related complaints beyond a "mere possibility".

[21] Counsel for Mr. Stuart's request for Jane Doe's health care records pre-dating the October 2017 incident include records of any diagnosis or treatment she received, including pharmaceuticals, of BPD or PTSD; records of any suicide attempts; and records from any other sexual assaults or sexual batteries.

[22] Counsel for Jane Doe does not appear to object to the disclosure of health care records in support of damages claimed. What he does request is a strict protective order based on the nature of the claim of Jane Doe against Mr. Stuart. He relies on the imposition of conditions by the Supreme Court of Canada in *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 ("*M.(A.)*"), when it had to decide whether to order disclosure of the plaintiff's treating psychiatrist's notes prepared during her treatment for the alleged sexual assault by her former treating psychiatrist. Noting the compelling privacy interest of medical records in sexual assault cases, the Court cautioned if the disclosure were automatic, the "result may be that the victim of sexual assault … is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress" (para. 30). The Court ordered disclosure of a limited number of documents, and imposed conditions on who could see and copy the documents, including prohibiting the defendant from seeing them.

[23] Here, Jane Doe requests that only one copy be provided of any documents ordered produced; access be granted only to Mr. Stuart's lawyer; access to expert

witnesses be granted after pre-approval by the Court or Jane Doe's lawyer; no access granted to Mr. Stuart; no disclosure to anyone else by those entitled to access; use only for this litigation, sealed from the public, and not to be used in any other litigation. Finally, Jane Doe requests that Mr. Stuart's lawyer not represent him in any other proceeding where Jane Doe can be expected to be a party or witness.

Analysis

[24] An obstacle to a final and complete ruling on this matter is the consideration of this application before the completion of discoveries. A full description of the health care records in issue is absent, and the evidence of Jane Doe from oral discovery does not yet exist. The ruling is therefore limited and there may be a need for a further hearing if the parties are unable to agree, unfortunately.

[25] The focus of this dispute is the production of records that pre-date the October 2017 incident, and the conditions sought to be imposed by Jane Doe on the records that will be produced.

Common law privilege and its application to this case

[26] The common law privilege principles derived from *Wigmore on Evidence*, 3 ed., (McNaughton Rev., 1961), Vol. 8, para. 2285, and approved in *Slavutych v. Baker*, [1976] 1 S.C.R. 254, apply to medical records. Those principles are:

1. the communication must originate in a confidence;
2. the confidence must be essential to the relationship in which the communication arises;
3. the relationship must be one which should be "sedulously fostered" in the public good; and

4. the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

[27] Here, the first three criteria are easily satisfied. Health care records are created in a confidence that is essential to the relationship between health care practitioner and patient. This is particularly true with psychiatric or counselling records. Without assurance that this private information stays private, a patient or client may be reluctant to disclose and treatment will be compromised. This relationship is one which ought to be sedulously fostered. Improving and maintaining the mental health of individuals is of public importance.

[28] The fourth criterion requires a balancing of interests. The Court in *M.(A.)* described the application of this balancing test:

> 37 … A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged. The result depends on the balance of the competing interests of disclosure and privacy in each case. … Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at the discovery stage. Finally, where justice requires that communications be disclosed, the court should consider qualifying the disclosure by imposing limits aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.

[29] Here, there is a compelling interest in preserving the confidentiality of the communications between Jane Doe and her treating caregivers, including physicians, psychologists, counsellors, and psychiatrists. The information exchanged in these

contexts is highly personal, intensely private and worthy of protection, especially in order to help with Jane Doe's healing process. The development of a confidential trust relationship with a health care professional in the context of mental health needs is essential to the well-being of Jane Doe.

[30] However, the law is clear that while a litigant has a privacy interest in their medical and health care records, if the records provide relevant evidence to the issues raised in the litigation, they must be disclosed (*Cook*, paras.11-13).

[31] A fundamental part of Jane Doe's claim is that she experienced emotional and psychological harm as a result of Mr. Stuart's actions. To prove her damages, she is relying on health care records of treatment of harms suffered. Mr. Stuart in his defence of these claims is entitled to see the information on which Jane Doe's claims for damages are based.

[32] Counsel for Jane Doe appears to recognize this and not to object to disclosing the records in support of the harms she claims to have suffered as a result of the alleged assaults. However, she seeks conditions on the disclosure.

Conditions on disclosure

[33] Jane Doe seeks the conditions on the disclosure described above at para. 23.

[34] The conditions she seeks are too broad. There is already an anonymity order, partial publication ban and partial sealing order for Jane Doe in place in this action (the October 2019 order). All court filings must refer to the defendant as Jane Doe. No evidence, submissions, information or materials in relation to this court file that could identify the defendant as a party to the proceeding, including any links to publications revealing the defendant's identity created before the October 2019 order can be

published, broadcast, or transmitted in any way. If any medical records were filed with the Court, they would have to comply with this order. Jane Doe's identity is protected adequately. There will be no order to require full sealing of the records produced as it is not justified under the open court principles.

[35] Jane Doe's request to limit access to Mr. Stuart's lawyer and not to allow access to Mr. Stuart is granted. This denial of direct access will not preclude Mr. Stuart from potentially gaining knowledge of some of the contents of the records through any expert report that refers to them, or to questions on discovery that may be asked about them. While I appreciate this limitation may affect instructions counsel for Mr. Stuart may be able to obtain, I adopt the reasoning in *M.(A.).* In a civil case for alleged sexual assault, the privacy interests in medical records, especially those related to mental health, and preventing the alleged victim from potentially being re-victimized, outweigh the need for the opposing party who is alleged to have committed the assault from seeing the records. Mr. Stuart has been and will be well-represented by his counsel who will have access to the records. Counsel for Mr. Stuart and anyone in his firm assisting him on this file will have access to the records.

[36] Any expert who is retained by Mr. Stuart will be entitled to review the records. They will be entitled to copies but they will not be entitled to share the records with others. The experts do not have to be pre-approved by counsel for Jane Doe or this Court in advance.

[37] The deemed undertaking rule in Rule 26 applies to all material or evidence obtained in pre-trial matters:

> Deemed undertaking
>
> (3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.
>
> Exceptions
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> (4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.
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> (5) Subrule (3) does not prohibit the use, for any purpose, of
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> (a) evidence that is filed with the court,
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> (b) evidence that is given or referred to during a hearing, and
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> (c) information obtained from evidence referred to in paragraphs (a) or (b).
>
> (6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

[38] No condition about further use of the records is required at this time as counsel for Mr. Stuart and Mr. Stuart are bound by this undertaking. Counsel for Mr. Stuart may provide a copy of the materials to experts he retains, but may not provide a copy to anyone else outside of his firm. If this matter gets to trial, any request about conditions on the future use of any evidence introduced at trial related to health care records may be dealt with at that time.

[39] The request that Mr. Stuart's lawyer be prohibited from acting against Jane Doe in any other proceeding is too broad in the context of this application. The facts do not

provide a foundation for this request. No law has been provided in support. It is unnecessary to consider this request and I decline to impose this condition.

Application of principles to records pre-dating the October 2017 incident

[40] The other matter in dispute is requested health care records that pre-date the October 2017 incident. Counsel for Mr. Stuart attempted to lay a foundation for their relevance by referring to the material suggesting that Jane Doe has BPD and PTSD, and appending a large amount of material from the internet about these conditions. His main reason for this request appears to be to impugn Jane Doe's credibility, because of the alleged link between BPD and pathological lying. The consequences of a negative credibility finding may provide a defence on the liability issue of consent. He also raises a causation argument: some or all of the harms claimed were a result of Jane Doe's pre-existing conditions, and not because of Mr. Stuart's actions on October 14-15, 2017.

[41] There was a significant amount of material submitted by counsel for Mr. Stuart describing BPD. There were lengthy preliminary arguments by both counsel on the admissibility of this BPD documentation. I have read the material and the written arguments and reviewed the oral submissions. I do not find it necessary to consider the documentation as it is not helpful for what I must decide.

[42] The material is not helpful because it is general in nature. Other than a passing reference in a newspaper article from [redacted], on an issue unrelated to the issues in this case, there is no evidence that Jane Doe has a medical diagnosis of BPD and/or PTSD. This must be established before any of the requests from Mr. Stuart are relevant. I further note that even if there were reliable evidence of a BPD diagnosis, to leap from such diagnosis to an allegation of pathological lying is unfounded on the basis of the

material before the Court. There was a reference in one 1986 general article to a possible association between the two. The Supreme Court of British Columbia decision of *G.(J.R.I.)* was relied on by counsel for Mr. Stuart for its description of BPD from the American Psychiatric Association, and provided by an expert called in that case. There was no reference in any of the expert evidence to the propensity to lie of people diagnosed with BPD. The plaintiff in that case and two similar fact witnesses were all diagnosed with BPD and were all found to be credible.

[43] The material provided by counsel for Mr. Stuart in this application is insufficient to ground a request for any reason for any health care records that may be related to BPD or PTSD before the October 2017 incident.

[44] However, as noted above, the courts in many personal injury actions regularly rule that records about a plaintiff's pre-existing medical conditions are relevant and producible, as they may help determine the extent to which the defendant is liable for the damages currently claimed by the plaintiff. In other words, if a pre-existing medical condition can be shown to have caused some or all of the harms now being attributed to the actions of the defendant then the defendant's liability and amount of attributable damages may be reduced.

[45] Thus, health care records indicating a pre-existing condition may be relevant if a connection can be established to the harms claimed by Jane Doe or causation of her damages by Mr. Stuart's actions. Counsel for Jane Doe has indicated his position that they are completely irrelevant to the matters at issue. Counsel for Mr. Stuart takes the opposite view. I have insufficient information at this time to determine this issue.

[46] It is premature before discoveries to rule on their disclosure at this time. If after review of the produced records and after discoveries, a connection may be made between any pre-existing condition and the damages claimed or the cause of the damages claimed, then they may be relevant and producible, under the same conditions as stated above.

[47] However, if the only reason they are being sought is for credibility determination this will not be permitted. Credibility determination is the role of the Court, to be determined on the facts and evidence before it (*Soodhar v. Bagley*, 2003 ABQB 524, at paras. 48-50).

[48] In making this ruling about records relevant to pre-existing conditions I recognize our rules differ from Rule 7-1(11) in the British Columbia *Civil Rules*, B.C. Reg. 168/2009, so that the cases relied upon by counsel for Jane Doe decided by the Supreme Court of British Columbia are not entirely applicable. The connection that is required to be established under the Yukon *Rules* is based on Rule 25. It requires the disclosure and production if requested of any document related to the matter in question.

[49] The same considerations apply to health care records requested related to suicide attempts and any other sexual assaults or sexual batteries before the October 2017 incident. Unless they are related to whether or not Jane Doe consented to the sexual encounters that occurred on October 14-15, 2017, and any harms or damages that may have resulted, they are not required to be produced.

[50] Finally, the request for records of any of Jane Doe’s hospital admissions since October 14-15, 2017, is too broad. Once again relevance must be established before

any such order can be made. At this time I have no evidence to be able to make that determination.

Conclusion

[51] For the above reasons, I order the following:

1. Jane Doe must disclose the health care records she relies on in her claim for damages from the alleged harms suffered as set out in her counterclaim, at her expense;
2. Any documents disclosed are protected by the Court Order of October 9, 2019, and the following additional conditions:
    i. access to these documents is limited to counsel for Mr. Stuart and others in his firm assisting on this matter, and any experts retained by him in this matter;
    ii. counsel for Mr. Stuart, other members of his firm, and any experts are not to share their copy of the records with anyone else.
3. The request for health care records that pre-date the incidents of October 14-15, 2017 is adjourned until after the completion of examinations for discoveries and production of the health care records referred to above, if the parties cannot agree.

[52] Costs in the cause.

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DUNCAN C.J.