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Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	
	)	
	)	***REASONS FOR JUDGMENT***
KRISTEN DEBRA-LEE SPENCER	)	
	)	
PLAINTIFF	)	
	)	
AND:	)	***OF***
	)	
ROBERT MICHAEL POULIN and DEBBIE THORNYCROFT	)	
	)	***MASTER BOLTON***
DEFENDANTS	)	
	)	***(IN CHAMBERS)***
AND:	)	
	)	
INSURANCE CORPORATION OF BRITISH COLUMBIA	)	
	)	
THIRD PARTY	)	

Sandy J. Kovacs and Karen M. Jones, Articled Student	Counsel for the plaintiff
Paul G. Kent-Snowsell	Counsel for the third party
Heard at Vancouver:	March 20, 1996

1 In this personal injury litigation, I have given oral reasons dealing with applications by the Third Party to compel the plaintiff to attend for medical assessments and for production of clinical and other records in the possession of third parties. These written reasons will be confined to a request for production

of clinical records from a psychologist who has treated the plaintiff.

2 Given the nature of the claims presented in this litigation, and the history of the plaintiff set out in the material before me, there cannot be the slightest doubt that notes made by the psychologist of his discussions with the plaintiff, and his observations of the plaintiff, may be relevant under the test best described, in this jurisdiction, in ***Dufault v. Stevens*** (1978) 6 B.C.L.R. 199; 86 D.L.R. (3d) 671 (C.A.). However, both the plaintiff and the psychologist object to production of the records on the basis that disclosure would be injurious to the health of the plaintiff.

3 The specific grounds for the psychologist's objection are set out in a letter to the plaintiff's solicitors dated March 19, 1996. Apparently, he asked counsel for the plaintiff to represent him on this application, and counsel very properly declined. Counsel did, however, pass up a copy of the psychologist's letter to the court, and relied very strongly on the doctor's representations in the course of arguing the issue from the point of view of his own client, the plaintiff.

4 I will set out the relevant portions of the psychologist's letter in full:

> " I appeal to you to deny any request to release my clinical files to the Court. To release my notes would be a great misrepresentation of my client. These notes say as much, if not more, about me.

> First, I want you to understand that my notes are not the typical notes found in a physician's file. My notes are not dictated. They are in my own hand, with my own style, intended for my eyes alone. Since I am not known for my handwriting skills, my notes would be somewhat of an embarrassment as an emissary of my work. I take pride in my work, not in my handwriting. It is my clinical reports that are intended for other professionals.
>
> Second, my broad brush covers a territory much wider than the original MVA and its psychological sequelae. My notes are a compilation of clinical hunches, hypotheses, metaphors, and other non-observational data. Observational data is compiled by using formal self report tests. These are released in my reports.
>
> Third, usually the client is not even aware of what I may be seeing and writing. My notes include symbols of healing, therapeutic goals, pitfalls, triumphs and victories - all as seen through my eyes. I am a member of a healing profession whose work is treatment oriented rather than testing and assessment. My goal is to use everything possible to assist clients to cope with the events of their lives.
>
> Fourth, my exploration of the psyche of clients is already invasive. To release this exploration to the public or the court would be a dangerous and reckless act injurious to the health of the client, analogous to rape. Please do not betray the confidentiality of the client established in a therapeutic and healing relationship."

The leading case in this area is the decision of the Court of Appeal in ***M.(A.) v. Ryan*** (1994) 98 B.C.L.R. (2d). I do not propose to review the background of that decision here, although it is all extremely relevant to the case now before me. I will confine myself to noting that in the result the court distinguished between notes kept by the psychologist which could reasonably be equated with the typical sort of clinical notes kept by any physician, and "notes to myself which are an attempt to make sense of what the

patient is telling me." The court ordered the former category produced, but not the latter. Southin, J.A. explicitly stated that she declined to order production of the latter category on the basis of an assurance by counsel for the plaintiff that the psychologist would not be called to testify at trial by the plaintiff, which led her ladyship to conclude that the psychologist's diagnoses would be of no relevance at trial.

5 Her ladyship made this decision after concluding that in applications such as this, the court is required to strike a balance between the competing interests of the parties, as described in paragraphs 46 and 47 of the report. This conclusion, in turn, can be traced to the speech of Lord Diplock in ***McIvor v. Southern Health and Social Services Board, Northern Ireland*** [1978] 2 All E.R. 625 (H.L.), where his lordship said:

> " The power under this section to order production of documents by a person who is not a party to the proceedings is discretionary in the sense that the court can decline to make the order if it is of the opinion that the order is unnecessary or oppressive or would not be in the interests of justice or would be injurious to the public interest in some other way."

6 In my respectful opinion, a different result must follow in the present case than that which was reached in ***M.(A.) v. Ryan***. The reason for the distinction is the different description of the psychologist's notes in the two cases. In the earlier case, the description of the note-taking process enabled the court to

distinguish between different types of notes. Here, the psychologist's description of his notes in the paragraphs commencing "Second" and "Third" set out above does not admit of an easy distinction between clinical-type records and "notes to myself".

7 But in my view, the description does disclose the potential for very serious misunderstandings, which could prejudice either party - most likely, but not necessarily, the plaintiff. If the court had the power to compel the psychologist to annotate and explain his notes, to distinguish between observations and "clinical hunches" or "hypotheses", then it may well have been appropriate to strike the balance in favour of the disclosure of annotated evidence relevant to the case the plaintiff has chosen to bring against the defendant. But this court has no power to order the psychologist to edit his notes at all. All that could be done is to order production of what already exists, and in view of the description of the nature and purpose of his notes, I am satisfied that if it would not be in the interests of justice to permit anyone to have access to these notes where a hypothesis might be misconstrued as a diagnosis, or a "clinical hunch" as an admission against interest by the plaintiff.

8 In short, in balancing the interests of the parties as described by Southin, J.A., using the scales provided by Lord Diplock, I am satisfied that a combination of oppression to the

plaintiff (which is a convenient way of summarizing the interference with the doctor-patient relationship described by the psychologist) and the interests of justice seen from the point of view of the plaintiff, outweigh the interests of justice from the point of view of the Third Party in obtaining full pre-trial disclosure of documents which may prove to be relevant.

9 In the circumstances, the application for production of the records is dismissed. But I will make explicit what may be implicit in this decision: as the potential relevance of the notes is clear, and the only reason for refusing production is the possibility of serious uncertainties or misunderstandings resulting from disclosure of the unedited notes, disclosure should be required in circumstances where the possibility of misunderstandings can be eliminated. Specifically, it seems to me that if the psychologist were served with a subpoena for trial he would be obliged to attend, with his notes, where he could clarify any uncertainties that might be apparent on the face of the documents themselves. At that time the trial judge will be well able to deal with any questions of limiting the extent of the disclosure.

10 Further, if the psychologist does discuss the condition of the patient with plaintiff's counsel, and relies upon his notes in the course of the discussion, this would provide an unacceptable advantage to the plaintiff in preparing for trial, as well as

waiving much of the risk of disclosure identified by the psychologist. In that eventuality (and I rely upon the professional responsibility of counsel to act accordingly) there will be an order for production of the entire set of records to plaintiff's counsel, that counsel edit them for relevance in accordance with a Halliday-type order, but that he also, on advice from the psychologist, annotate them to explain any patent uncertainties, and provide copies to counsel for the Third Party with seven days.

Dated at Vancouver, British Columbia, this 22nd day of March, 1996.

"A. Neil Bolton"
A. Neil Bolton
Master