

2009 01H

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

POH GIN SZETO

**INTENDED APPELLANT
(FIRST PLAINTIFF)**

AND:

CHRISTOPHER SZETO

**INTENDED APPELLANT
(SECOND PLAINTIFF)**

AND:

GERALD DWYER [Discontinued]

FIRST DEFENDANT

AND:

MAUREEN DWYER [Discontinued]

SECOND DEFENDANT

AND:

WINNIFRED FIELD

**INTENDED RESPONDENT
(THIRD DEFENDANT)**

**MEMORANDUM OF ARGUMENT
OF INTENDED APPELLANTS**

CHES CROSBIE BARRISTERS
Solicitors for the Intended Appellants
169 Water Street, 4th Floor
St. John's, NL A1C 1B1
Attention: Chesley F. Crosbie, Q.C.

TO: GOODLAND O'FLAHERTY
Solicitors for the Intended Respondent
16 Forest Road, Suite 200
St. John's, NL A1C 2B9
Attention: Rebekah J. Slemm

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PART I – THE NATURE OF THE APPLICATION

1. This is an application for leave to appeal the order of Hall, J. that the Appellants answer certain Interrogatories. The application is brought pursuant to Rule 57.02 of the *Rules of the Supreme Court, 1986*.

Rule 57.02, *Rules of the Supreme Court, 1986* [Appendix B, Tab 1]

2. The Intended Appellants say that the learned application judge has pronounced an intrusive order which requires them to provide private and confidential personal information outside the test of relevance and is oppressive, contrary to Rule 31.03(2) (relevance) and Rule 31.02(2) (oppression).

Rule 31, *Rules of the Supreme Court, 1986* [Appendix B, Tab 2]

PART II – THE FACTS

3. The Statement of Claim was issued on behalf of the Plaintiffs in April 2007 and served the same month. It concerned a T-bone accident on January 2, 2005 in St. John's, by which the Plaintiffs' vehicle was struck on the driver's side door.

Statement of Claim dated April 10, 2007, Application Record, Tab 4

4. The Statement of Defence of the Third Defendant was filed on May 16, 2007. The Third Defendant is the only defendant now in the proceeding and the Applicant in this matter. The action against the First and Second Defendants was discontinued on January 28, 2008.

Statement of Defence, dated May 16, 2007 Application Record, Tab 5

5. The Interrogatories of the Third Defendant which are the subject of this application are dated May 17, 2007, one day after the date of the Defence of the Third Defendant.

Interrogatories dated May 17, 2007, Application Record, Tab 6

6. As to matters in issue on the pleadings, the Statement of Claim alleged at paragraph 7 that “as a result of the Third Defendant’s negligent operation of the Third Defendant’s motor vehicle, the First and Second Plaintiffs suffered personal injuries.” As to damages, the prayer for relief at paragraph 11 claimed “special damages to be determined; general damages for pain and suffering and loss of amenities.”

Statement of Claim dated April 10, 2007, Application Record, Tab 4

7. The Statement of Defence of the Third Defendant admitted paragraphs 1 through 4 of the Statement of Claim, denied negligence, and at paragraph 5 denied “that the Plaintiffs have incurred any bodily injuries, expenses or losses as claimed therein and puts the Plaintiffs to the strict proof thereof.” Paragraph 6 of the Defence was to similar effect. These then, are the issues joined by the pleadings.

Statement of Defence, dated May 16, 2007 Application Record, Tab 5

8. As to the Interrogatories, paragraphs 1, 2, 5, 7, and 8 request information for a period three years prior to the date of the accident, which was January 2, 2005. At the date served, the Interrogatories requested more information from before the accident than from after the accident.

Interrogatories dated May 17, 2007, Application Record, Tab 6

9. The following two interrogatories give the flavor of the questions asked of each Plaintiff:
 1. For the time period January 1st, 2002 to present, please advise of all physicians that you have received medical services from, including particulars of the names of the physicians, the location of their offices, the dates of the visits, the complaints you made to the physicians at each visit, and the treatment – including referrals and prescriptions each physician rendered to you on each particular visit.
 7. For the time period January 1, 2002 to present, please advise of your annual gross income for the years, respectively, of 2002, 2003, 2004, 2005 and 2006, please particularize that part of your gross annual

income which was for employment and that part or parts which you received from other sources. If you have non-taxable benefits of any kind please specify.

Interrogatories dated May 17, 2007, Application Record, Tab 6

10. It might be noted as a fact that the *Automobile Insurance Act* permits recovery of net income only, not gross income.

Automobile Insurance Act, RSNL 1990, c. A-22, s. 26.4(1) [Appendix B, Tab 3]

11. The answer to question 9 of the Interrogatories, and arguably the answer to question 3, are admitted by the Defence. Hall, J. found question 9 and question 10 to be “irrelevant”.
12. In the present case, Lists of Documents have been exchanged. A settlement demand was presented to the Third Defendant on behalf of the Second Plaintiff Christopher Szeto dated November 10, 2008. The Third Defendant has not responded. The demand was for the approximate amount of \$18,000 in non-pecuniary general damages. *No claim was made for pecuniary loss*, other than law firm disbursements.

Claim Demand dated November 10, 2008, Application Record, Tab 7

13. The First Plaintiff has provided a copy of her family physician’s medical records to the Third Defendant, dating from the date of the accident.

Clinical Chart of Dr. Callahan-Dyer, Application Record, Tab 8

14. The Third Defendant brought an application for an order that the Interrogatories be answered, dated November 12, 2008.

Application of Third Defendant dated November 12, 2008, Application Record, Tab 9

15. The Plaintiffs provided consents to the Third Defendant to facilitate the obtaining by the Third Defendant of the MCP record of services, including the diagnostic codes used for

billing purposes, which information is kept by the Department of Health for seven years. The Third Defendant made no reliance on this information in attempting to show the relevance of pre-accident medical information.

16. The ratio of the decision of Hall, J. is stated in the following paragraph:

[14] In all other respects, I am satisfied that the questions are relevant to the claims raised, namely “personal injuries”, “pain and suffering and loss of amenities”, “special damages”, and “further and other relief”. Certainly, claims for loss of amenities raise questions whether those amenities had been lost by reasons of earlier accidents or pre-existing disease. The Applicant needs to be able to verify prior incomes to determine potential lost incomes. All of the questions permitted can be answered easily without great effort or cost on the part of the Respondents. There is nothing oppressive or irrelevant being sought nor are the permitted questions embarrassing, unreasonably annoying nor likely to cause expense. In fact, the process chosen may obviate the need for oral discovery and thus save expense.

Decision of Hall, J. dated January 23, 2009, Application Record, Tab 3

PART III – THE ISSUE

17. The issue is whether the intended Appellants may have leave to appeal the decision of Hall J. If leave is granted, there are five questions that the Appellants seek to argue. These are:

- (1) Whether the learned application judge erred in principle in requiring disclosure of personal medical and financial information from the Second Plaintiff which is clearly irrelevant due to the known scope of his claim.
- (2) Whether the learned application judge erred in principle in failing to place the onus on the Defendants to show the relevance of pre-accident personal medical and financial information.
- (3) Whether the learned application judge erred in principle by failing to recognize and apply the presumptions of privacy and confidentiality of personal medical and financial information.
- (4) Whether the learned application judge erred in principle by failing to recognize and apply the principle of proportionality in the application of the rules of civil procedure.
- (5) Whether the learned application judge erred in principle by failing to recognize and apply the difference in principle between the rule 32 test of “relates to” and the rule 31 test of “relevant”.

PART IV – ARGUMENT

(a) Test for Leave to Appeal

18. Rule 57.02(4) of the *Rules of the Supreme Court* lists factors to be weighed in determining whether to grant leave to appeal. These are:

57.02(4) Leave to appeal an interlocutory order may be granted where

- (a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,
- (b) the Court doubts the correctness of the order in question,
- (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,
- (d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or
- (e) the Court is of the view that the interests of justice require that leave be granted.

Rule 57.02, *Rules of the Supreme Court, 1986* [Appendix B, Tab 1]

19. Each of the factors under Rule 57.02(4) supports leave being granted in this case.

(b) Reason to Doubt Correctness of Order

20. With respect to 57.02(4)(b), there is reason to doubt the correctness of the order in question. The learned application judge's decision turned on the interpretation of subordinate legislation. The standard of review for such a decision is one of correctness. Deference is not owed by the appellate court on questions of law.

Sun Life Assurance Company of Canada et al. v. City of St. John's et al., (2007) 261 Nfld. & P.E.I.R. 55 (N.L.C.A.), 2006 NLCA 62 (CanLII), para. 28 [Appendix A, Tab 1]

21. Alternatively, if the order below is discretionary, the judge below has failed to apply the necessary principles.

Morrissey v. Quinlan, 2002 NFCA 58 (CanLII), paras. 10-11 [Appendix A, Tab 2]

22. The Rule 32.01(1) duty to exchange documents “relating to every matter in question in the proceeding” is broader than the concept of relevance.

Municipal Construction Ltd. v. Healey, 2001 NFCA 58 (CanLII), para. 8 [Appendix A, Tab 3]

23. The judge below quoted and appeared to accept *Kulpinski v. Toronto Transit Commission*, 2000 CarswellOnt 194, which summarized with respect to medical documents the effect of previous Ontario caselaw:

The cumulative effect of these decisions is that in respect of documentary discovery in a personal injury claim a plaintiff is obliged, subject to any claims of privilege, not only to produce the medical documentation in his possession having a *semblance of relevance* to the physical condition put in issue in the action but also to authorize and request his doctors to produce his post-injury treatment notes and records. *In respect of pre-accident treatment notes and records, the onus is on the defendants to show relevancy*, again subject to any claims of privilege, and if shown the plaintiffs obligation would again be to authorize and request the pre-accident treatment notes and records.” [para. 34] [Emphasis added]

Kulpinski v. Toronto Transit Commission, 2000 CarswellOnt 194, para. 34 [Appendix A, Tab 4]

24. The judge below cited *Kulpinski, supra* as to the principle that with respect to pre-accident information, the onus is on the defendant to show relevance, but he failed to apply the principle. This principle was stated by L’Heureux-Dubé, J. (dissenting, but not on this point):

[T]he defence must establish the likely relevance of the documents ... this threshold will not be overcome by mere speculation as to the contents of the records or biased hypotheses about such plaintiffs.

M.(A.) v. Ryan, 1996 CanLII 5646 (S.C.C.), para. 55 [Appendix A, Tab 5]

25. The proponent of disclosure of private information must lay an adequate foundation in the record or run the risk of non-persuasion:

[L]ike any other motion, an application for an order for production of private records held by a third party must be accompanied by affidavit evidence which establishes to the judge’s satisfaction that the information sought is likely to be relevant.

R. v. O’Connor, 1995 CanLII 51 (S.C.C.), para. 140 [Appendix A, Tab 6]

26. Criminal cases have their own special context, but it is submitted that the principle is the same:

[28] The first step in any contested application for production of non-privileged documents in the possession of a third party is for the person seeking production – in this case the accused – to satisfy the court that the documents are likely relevant to the proceedings.

R. v. McNeil, 2009 SCC 3 (CanLII), para. 28 [Appendix A, Tab 7]

27. Atlantic Provinces courts have followed a policy of restraint in ordering production of medical information, even refusing production of portions of the post-accident medical file which do not “relate” to the injury:

20 The requirement for production should be no more intrusive than is necessary to enable the other party to know what case he/she must meet or to establish his/her defence to the claim. My reading of the pleadings and in particular the plaintiff’s statement of claim, leads me to the conclusion that the plaintiff is seeking recovery with respect to a relatively narrow aspect of her health, i.e., the fracture of her left leg that occurred at the time she slipped and fell on the ice.

21 At this time, therefore, I see no reason why the plaintiff should be obliged to produce for inspection any part of her physician’s file that does not relate to this injury....

Andrew v. Rex’s Holdings Ltd., 1996 CarswellNS 184 (S.C.), paras. 20-21 [Appendix A, Tab 8]

28. The default position for document production is that pre-accident information does not have semblance of relevance, with the onus on the party seeking production to show otherwise. The test for obtaining information by interrogatories is relevance, which is a narrower test than the “relates to” test or semblance of relevance test for document production. The presumption against disclosure of pre-accident information is stronger, when it is sought by way of interrogatories, than when it is sought by way of document production, because the test is narrower.
29. The court in *Andrews, supra* and the court below in the present case both reviewed the pleadings to define the scope of the claim and therefore relevance. This is correct methodology. However the court below in the present case, did not explain why it failed to consider the scope of the actual claim as defined by the claim demand.
30. The decision has overthrown a long established balance between privacy and fairness by authorizing the automatic invasion of the reasonable expectation of privacy held by personal injury claimants with respect to their pre-accident and post-accident personal information, including information provided in confidential relationships, no matter how narrow the scope of the claim.
31. The judge’s decision conflicts with prevailing caselaw and sound principle, and its correctness must be doubted.

(c) Public Importance

32. It is submitted that this intended appeal raises matters of public importance which are of broad application beyond the immediate parties, supporting leave under Rule 57.02(4)(c). The proper scope of the obligation to provide confidential information and private information is of concern to all consumers of legal services in this province and beyond, who seek access to justice in the civil courts.

33. While the Intended Appellants agree that the confidentiality and privacy with which the law regards personal health and financial information must give way to the exigencies of the Rules of Court and fairness to the defendant in personal injury litigation, they say that the judge below gave little or no weight to the principle of confidentiality of health care relationships or the reasonable expectation of privacy as enshrined in caselaw.

Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient.... [S]uch information remains in a fundamental sense one's own, for the individual to communicate or retain as he or she sees fit.

McInerney v. MacDonald, 1992 CanLII 57 (S.C.C.), p. 6
[Appendix A, Tab 9]

36 [J]ustice requires that a defendant in a civil suit be permitted to answer the plaintiff's case. In deciding whether he or she is entitled to production of confidential documents, this requirement must be balanced against the privacy interest of the complainant.

37Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at the discovery stage.

38I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a license to delve into private aspects of her life which need not be probed for the proper disposition of the litigation.

M.(A.), *supra*, paras. 36-38 [Appendix A, Tab 5]

34. The common law attaches great importance to the value of privacy and this emphasis has been reinforced by the imperative that the common law should develop in a manner consistent with *Charter* values.

This court has on many occasions recognized the great value of privacy in our society. It has expressed sympathy for the proposition that s. 7 of the *Charter* includes a right of privacy:... On numerous other occasions, it has spoken of privacy in terms of s. 8 of the *Charter*:... On still other occasions it has underlined the importance of privacy in the common law.... [citations omitted]

R. v. O'Connor, supra, para. 110 [Appendix A, Tab 6]

35. The decision employs an unbounded concept of relevance, and stands for the proposition that any person who claims personal injury of any kind must provide virtually unlimited private and confidential information to a defendant.
36. The order of Hall, J. raises issues of public importance with respect to the value to be assigned to privacy and confidentiality, and the balancing of the plaintiff interest in privacy and confidentiality with fairness to the defendant, including the proper allocation of the burden of proof.

(d) Final Judgment

37. The order that the personal health and financial information of the Intended Appellants be provided, is final in the sense that the Intended Appellants must comply in order to proceed with their case. The injury is constituted by what they view as an unwarranted intrusion into their confidential information and their right of privacy which cannot later be repaired.

The essence of privacy, however, is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure.

R. v. O'Connor, supra, para. 111 [Appendix A, Tab 6]

(e) Conflicting Judgments

38. The learned application judge's balancing of the confidentiality and privacy of personal information and his balancing of the needs of the litigation process, including his understanding of relevance and the allocation of the onus of proof, conflicts with the caselaw above.

(f) Interests of Justice

39. With respect, the order that the Second Plaintiff provide pre- and post-accident financial information under oath is a clear miscarriage of justice. The Second Plaintiff has presented his claim and there is no issue of pecuniary loss. This fact was before the learned judge below. Hall, J. did not explain why he considered the pleading in defining the scope of the claim, but not the actual claim.

Conclusion

40. The Intended Appellants have a meritorious appeal. They have raised genuine issues of public importance and broad application. With respect, the learned applications judge failed to place adequate or any emphasis on the confidentiality of personal medical and financial information, failed to apply the doctrine of onus of proof appropriately with respect to pre-accident and post-accident information, and ordered disclosure of confidential and private personal information from the Second Plaintiff which is clearly irrelevant, due to the known scope of the Second Plaintiff's claim as excluding pecuniary loss. Because the vast majority of personal injury cases settle, these deserving issues are unlikely to benefit from resolution by this court unless leave is granted.

PART V- RELIEF REQUESTED

41. The Intended Appellants request that leave to appeal be granted.

RESPECTFULLY SUBMITTED this day of February, 2009.

CHES CROSBIE BARRISTERS
Solicitors for the Intended
Appellants, whose address for
service is: 169 Water Street, 4th Floor
St. John's, NL A1C 1B1
Attention: Chesley F. Crosbie, Q.C.

TO: GOODLAND O'FLAHERTY
Solicitors for the Intended Respondent
16 Forest Road, Suite 200
St. John's, NL A1C 2B9
Attention: Rebekah J. Slein

APPENDIX A – AUTHORITIES CITED**TAB**

- 1 *Sun Life Assurance Company of Canada et al. v. City of St. John's et al.*, (2007) 261 Nfld. & P.E.I.R. 55 (N.L.C.A.), 2006 NLCA 62 (CanLII)
- 2 *Morrissey v. Quinlan*, 2002 NFCA 58 (CanLII)
- 3 *Municipal Construction Ltd. v. Healey*, 2001 NFCA 58 (CanLII)
- 4 *Kulpinski v. Toronto Transit Commission*, 2000 CarswellOnt 194
- 5 *M.(A.) v. Ryan*, 1996 CanLII 5646 (S.C.C.)
- 6 *R. v. O'Connor*, 1995 CanLII 51 (S.C.C.)
- 7 *R. v. McNeil*, 2009 SCC 3 (CanLII)
- 8 *Andrew v. Rex's Holdings Ltd.*, 1996 CarswellNS 184 (S.C.)
- 9 *McInerney v. MacDonald*, 1992 CanLII 57 (S.C.C.)

APPENDIX B – STATUTES CITED**TAB**

- 1 Rule 57.02 of the *Rules of the Supreme Court, 1986*
- 2 Rule 31 of the *Rules of the Supreme Court, 1986*
- 3 *Automobile Insurance Act, RSNL 1990, c. A-22*