CITATION: Aherne v. Chang, 2011 ONSC 3846
COURT FILE NO.: 08-CV-358325
DATE: June 20, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Julie Aherne, Devin Aherne, Mary Janet Kasperski and Jack Aherne and Lucas Aherne, minors by their Litigation Guardian Julie Aherne

Plaintiffs

- and -

Paul Chang, Stephen Power, John Doe and London Health Sciences Centre

Defendants

COUNSEL:

- Deanna S. Gilbert for the Plaintiffs
- Kirk F. Stevens for the Defendants Paul Chang and Stephen Power

HEARING DATE: June 17, 2011

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] In deciding a refusals motion in a medical negligence action, Master Short introduced what may be an innovation to the practice and procedure associated with defence medicals. The novelty is found in paragraph 3 of the Master's order, which states:

> 3. THIS COURT ORDERS that should the defendants, Paul Chang and Stephen Power, require the plaintiff, Julie Aherne, to attend a defence medical examination and should they provide the health practitioner retained to conduct such an examination with any particulars or records (including any written or oral reports, photos, videos, or other electronic records) of surveillance conducted on her, they shall provide the plaintiffs with a copy of such records at the same time the said defendants provide them to the health practitioner.

[2] The Defendants, Paul Chang and Stephen Power, appeal the Master's order and submit that the Master erred in his conclusion about the timing of when surveillance

records provided to a health practitioner for a defence medical should be provided to the plaintiff.

[3] The Defendants submit: that the early disclosure of the surveillance records is unsupported by the authorities; that it would enable a plaintiff to deceive the health practitioner; and that no useful purpose is served in disclosing prematurely the surveillance records, which will be disclosed to the Plaintiffs later when the health practitioner's report is delivered.

[4] For the reasons that follow, I dismiss the Defendants' appeal. In my opinion, the Master's order is supported by the law associated with waiver of privilege, and it is supported by the law associated with the disclosure of an expert's findings when a report is delivered.

B. FACTUAL AND PROCEDURAL BACKGROUND

[5] Julie Aherne sues on her own behalf together with her husband, her mother, and her children for injuries alleged to have been caused as a result of her medical treatment by the Defendants, Dr. Chang and Dr. Power, at the Defendant London Health Sciences Centre.

[6] The Plaintiffs allege that as "a result of being repeatedly exposed to latex, Julie suffers from cognitive impairments, chronic pain, anxiety, emotional distress, confusion, fatigue, and limited functioning. Julie's enjoyment of life has been reduced and her ability to earn a livelihood impaired."

[7] The Defendants allege that Julie is exaggerating her injuries.

[8] During Dr. Chang's examination for discovery, after he revealed that no surveillance had been conducted of Ms. Aherne, her lawyer asked for an undertaking to produce a copy of any surveillance records concurrent with the release of the records to any health practitioner retained to perform a defence medical assessment of the Plaintiff.

[9] The undertaking was refused, and Ms. Aherne moved for an order compelling an answer to the undertaking. Master Short wrote extensive reasons, and he granted Ms. Aherne's motion. The Master's reasons are reported as *Aherne v. Chang*, 2011 ONSC 2067 (Master).

[10] The Master concluded that if a defendant sends privileged surveillance reports to a defence medical expert, the defendant waives privilege over the surveillance reports.

C. DISCUSSION

[11] The Defendants submit that for the purposes of appellate review, the standard for review of the Master's order is correctness. They submit that the Master's order should be set aside because it is wrong. The nature of the Defendants' arguments also reveals that they submit that the Master's order is also unreasonable. As will become apparent from the following discussion, although my own line of reasoning is different than the Master's, in my opinion, his order was both correct and reasonable. I, therefore, find it unnecessary to comment further about the standard of appellate review.

[12] With some oversimplification, my opinion, which I will develop in detail below, is that the rules about the production of defence medicals and the law about waiver of privilege entail or have the consequence that if the defendant discloses surveillance evidence to a health practitioner - which the defendant is not obliged to do - then the defendant has waived the litigation privilege associated with the surveillance evidence.

[13] Put somewhat differently, the defendant's voluntary disclosure of surveillance evidence to a health practitioner for the purposes of a defence medical has the consequence that the surveillance evidence should be immediately disclosed to the plaintiff.

[14] Notwithstanding, the Defendants' argument that this early disclosure of the surveillance evidence would be harmful or purposeless, in my opinion, the early disclosure is supported by the existing law and is all of procedurally fair, efficient, and productive to the settlement or adjudication of the lawsuit.

[15] The Master's conclusion was similar. However, in addition to extrapolating from the current law about defence medicals, the Master relied heavily on the recent amendments to the *Rules of Civil Procedure* about proportionality in the administration of justice and about the role of expert witnesses, which amendments emphasize that experts are not to be partisans or "hired guns" for the parties but rather an expert is to assist the court in the pursuit of truth. See Rule 4.1.01 and *Beasley v. Barrand*, 2010 ONSC 2095.

[16] While I agree that these amendments support or are complimentary to the Master's conclusion, I do not rely on them in reaching my own conclusion. I will return to this point below, but, in my opinion, it is not necessary to decide the case at bar to engage in law reform or development of procedural law. As it happens, Master Short's ruling may be a helpful advance; however, I think, his ruling can be grounded as a logical and necessary incident of the current law and a helpful clarification of the law.

[17] The law of privilege associated with surveillance and several rules from the *Rules of Civil Procedure* are the starting point for a more detailed discussion of the

Master's reasoning and my own reasoning and of our shared conclusion that if surveillance evidence is voluntarily disclosed to a health practitioner retained for a defence medical, then it should be simultaneously disclosed to the plaintiff.

[18] Surveillance material made in connection with anticipated or pending litigation is privileged under the umbrella of litigation privilege. However, like other material for which litigation privilege is claimed, the existence of surveillance material must be disclosed in a party's affidavit of documents.

[19] Moreover, if the surveillance material is provided to an expert witness who will be a witness at trial, then the opposing party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of the expert engaged by or on behalf of the party being examined that are relevant to a matter in issue. This intrusion on litigation privilege is codified in rule 31.06 (3), which states:

> *Expert Opinions*
>
> 31.06 (3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
>
> > (a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
> >
> > (b) the party being examined undertakes not to call the expert as a witness at the trial.

[20] On his or her examination for discovery, the party gathering the surveillance material must disclose the date, times and locations of the surveillance, particulars of the observations made, and the names and addresses of the persons who conducted the surveillance: *Ceci (Litigation Guardian of) v. Bonk*, (1992), 7 O.R. (3d) 381 (Ont. C.A.); *Walker v. Woodstock*, [2001] O.J. No. 157 (Div. Ct.); *Devji v. Longo Brothers Fruit Markets Inc.*, [1999] O.J. No. 1542, 45 O.R. (3d) 82 (Gen. Div.); *Murray v. Woodstock Hospital Trust*, (1988), 66 O.R. (2d) 129 (Div. Ct.); *Sacrey v. Berdan*, [1986] O.J. No. 2575 (Dist. Ct.).

[21] The idea in rule 31.06 (3) of disclosure of the expert witness' "findings" has been given a wide meaning. "Findings" include all documents, videotapes, photographs and any information which were forwarded to expert witnesses including surveillance information: *Beausoleil v. Canadian General Insurance Co.*, [1993] O.J. No. 2200 (Gen. Div.); *Binkle v Lockhart* (1994), 24 C.P.C. (3d) 11 (Gen. Div.).

[22] Putting aside the matter of a rule for defence medicals, except for these statutory intrusions into the litigation privilege and the rules associated with the exchange of experts reports, discussed below, a party gathering surveillance material may retain the privilege associated with the material. If the party does not waive or abandon the privilege, then, except for the purposes of impeachment at trial, the party may not use the surveillance material at trial. This regime follows because the use of the surveillance material is governed by rule 30.09, which states:

> PRIVILEGED DOCUMENT NOT TO BE USED WITHOUT LEAVE
>
> 30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

[23] In the case at bar, Dr. Chang was asked to give an undertaking that should surveillance information be provided to a doctor retained for a defence medical, he would provide the plaintiffs with a copy of such records at the same time the said defendants provided them to the health practitioner. Dr. Chang refused to give the undertaking.

[24] There are two explanations why Dr. Chang's refusal to provide the undertaking should be overruled. The first explanation is that by voluntarily disclosing the surveillance material to the health practitioner, Dr. Chang waived the litigation privilege associated with the surveillance material. The second explanation is that the waiver of the litigation privileges associated with the surveillance evidence is a consequence of the operation of s.105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and rules 33.04 (2), 33.06 (1), and 53.03 of the *Rules of Civil Procedure*.

[25] Litigation privilege may be waived intentionally or inferentially or as a matter of fairness. In *S. & K. Processors Ltd. v. Campbell Ave Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.), which was followed in Ontario in *Browne (Litigation Guardian of) v. Lavery* (2002), 58 O.R. (3d) 49 (S.C.J.), Justice McLachlin, as she then was, stated at p. 148-49:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege. However, waiver may also occur in the absence of the intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be a waiver as to the entire communication.

[26] As a matter of fairness and consistency, if the defendant voluntarily - recall that the defendant is not obliged to provide this information to the health practitioner -

provides surveillance information to the health practitioner, then the same information should be provided to the plaintiff.

[27] As will be noted below, under rule 33.04 (2), which is set out below, the plaintiff is compelled to provide his or her medical records and medical report to the health practitioner, and under s. 105 (5) of the *Courts of Justice Act*, which is also set out below, the plaintiff shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence. Having disclosed his or her information and being compelled to make further disclosure, it is a matter of rudimentary fairness that the plaintiff know what information the defendant has provided to the health practitioner. The disclosure of the information is also consistent with the policy of the modern rules of civil procedure to reduce ambush and surprise as tactical weapons in the adversary system of adjudication.

[28] In the case at bar, Dr. Chang objects that disclosing the surveillance evidence to a plaintiff will provide him or her with an opportunity to prepare and tailor answers to deceive the health practitioner. The answer to that objection is that it is overblown.

[29] In some cases, the plaintiff will already know that there is surveillance evidence because its existence will be disclosed in the affidavit of documents or because particulars will have been disclosed during an examination for discovery. In all cases, it is more likely that the disclosure will advance and not hinder the search for the truth. In *Ceci (Litigation Guardian of) v. Bonk, supra*, Justice Carthy observed at para. 10 of his judgment:

> 10. In my view, the discovery rules must be read in a manner to discourage tactics and encourage full and timely disclosure. Tactical manoeuvres lead to confrontation. Disclosure leads sensible people to assess their position in the litigation and to accommodate. In cases such as this, there will be very few litigants who successfully maintain a dishonest stance simply because they have been exposed to the other party's evidence in advance of giving answers. It is more likely that the process of discovery will make it difficult for a litigant to conceal untruth and that a plaintiff will back away voluntarily from claims that are exposed as invalid, limiting further expense in the litigation.

[30] I conclude, therefore, that at common law, there is a waiver of litigation privilege if the defendant provides the health practitioner with the surveillance evidence, and I turn now to the second explanation why Dr. Chang's refusal to provide the undertaking should be disallowed. This explanation concerns the interpretation and operation of s. 105 of the *Courts of Justice Act* and several rules of civil procedure.

[31] Section 105 provides for what has come to be known as the defence medical. Section 105 states:

> 105 (1) In this section, "health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists or Ontario or a person certified or registered as a psychologist by another jurisdiction.
>
> (2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners ….
>
> (5) Where an order is made under this section, the party examined shall answer the questions of the examining health professional relevant to the examination and the answers given are admissible in evidence.

[32] Under s. 105, a plaintiff is obliged to undergo a physical or mental examination by one or more health practitioners. The plaintiff is obliged to answer questions, and the answers are admissible in evidence. As noted above, rule 33.04 (2) requires the plaintiff to provide information to the health practitioner. Rule 33.04 (2) states:

> *Party to be Examined must Provide Information*
>
> (2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,
>
> > (a) any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and
> >
> > (b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing.

[33] After conducting an examination, the health practitioner is obliged to make a report, which is disclosed to all parties. Rule 33.06 (1) states:

> MEDICAL REPORTS
>
> *Preparation of Report*
>
> 33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.
>
> *Service of Report*
>
> (2) The party who obtained the order shall forthwith serve the report on every other party.

[34] Pausing here, it is to be observed that unlike the situation for other expert's reports, the health practitioner's report must be disclosed to all parties. There is no prospect of the defendant undertaking not to call the expert as a witness at the trial as a means to keep the report confidential. No privilege is attached to the report. It, therefore, is arguable that no privilege is attached to the information that has been provided to the health practitioner to prepare the report.

[35] In any event, the material provided to the health practitioner, including surveillance evidence, should be disclosed as a part of the information provided under rule 53.03, which requires the filing of a report from any expert who a party intends to call as a witness at trial. Rule 53.03 states:

> 53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
>
> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
>
> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
>
> 1. The expert's name, address and area of expertise.
>
> 2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
>
> 3. The instructions provided to the expert in relation to the proceeding.
>
> 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
>
> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
>
> 6. The expert's reasons for his or her opinion, including,
>
> i. a description of the factual assumptions on which the opinion is based,
>
> ii. a description of any research conducted by the expert that led him or her to form the opinion, and
>
> iii. a list of every document, if any, relied on by the expert in forming the opinion.

[36] The disclosure of the surveillance information as an aspect of the expert's report is required because that information would form part of the "instructions provided to the expert in relation to the proceeding" and the surveillance information would be part of the expert's reasons for his or her opinion.

[37] For present purposes, the point to note is that like rule 31.06 (3), discussed above, which requires the disclosure of information on an examination for discovery, rule 53.03 (2.1) is a statutory waiver or intrusion on litigation privilege. This observation and the fact that if the surveillance information was voluntarily provided to the health practitioner, it would be disclosed no later than the delivery of the health practitioner's report draws attention to the genuine nature of the dispute in the case at bar.

[38] The dispute in the immediate case is not about whether the litigation privilege associated with the surveillance evidence is waived by force of the rules. Rather, the focus of the dispute is on **when** that waiver takes place. The Defendants would have it that the waiver takes place when the health practitioner delivers his or her report. The Plaintiffs would have it that the statutorily imposed waiver takes place earlier when the Defendants voluntarily send the surveillance information to the health practitioner as part of the instructions to the expert.

[39] In *Beusoleil v. Canadian General Insurance Co.*, [1993] O.J. No. 2200 (Gen. Div.), Justice Howden held that disclosure to the defendant's medical experts of surveillance records impliedly waived privilege with respect to the surveillance evidence. Justice Howden, however, did not specify when the waiver occurred.

[40] *Beusoleil* was followed in *Binkle v. Lockhart*, [1994] O.J. No. 399 (Gen. Div) and *Dumaliang v. Cheng*, [2006] O.J. No. 4314 (Master).

[41] In *Bazinet v. Davies Harley-Davidson*, [2007] O.J. No. 2420 (S.C.J.), the plaintiff's expert, Mr. Sack, delivered a report that included reference to the report of another expert, Mr. Gray. The plaintiff, however, claimed litigation privilege with respect to Mr. Gray's report. Justice Power ruled that the plaintiff had waived the privilege associated with Mr. Gray's report by providing a copy to Mr. Sack. In para. 26 of his reasons, Justice Power stated: "… while initially there was no waiver, there was a waiver of privilege at the time it was decided to produce the second report and rely on the second expert's [Mr. Gray] opinion."

[42] In the case at bar, the Defendants accept that the *Beusoliel, Binkle, Dumaliang, and Bazinet* cases are authority that supports the proposition that surveillance material referred to or relied on in a health practitioner's report is no longer privileged. They submit, however, that Justice Power's statement that the waiver occurs when the decision was made to produce the privileged material to the expert was unnecessary

obiter given that the expert in that case had already delivered his own report, which could also date the occurrence of the waiver. I disagree, waiver is the act of the person with the privilege and I think that Justice Power was correct in *Bazinet* in stating that the waiver occurred when the plaintiff decided to provide Mr. Sack with the privileged material.

[43] I, therefore, agree with the Plaintiffs' argument that waiver of litigation privilege takes place when the defendant voluntarily sends the surveillance information to the health practitioner knowing that it will be disclosed to the plaintiff.

[44] Temporally locating the waiver with the defendant's decision to provide the surveillance material to the health practitioner is procedurally fairer and more efficient. Very few cases reach trial, and the disclosure of the surveillance evidence simultaneously to the health practitioner and the plaintiff is more likely to lead to a just and true determination of the dispute. As Justice Carthy noted in *Ceci (Litigation Guardian of) v. Bonk*: "there will be very few litigants who successfully maintain a dishonest stance simply because they have been exposed to the other party's evidence in advance of giving answers."

[45] I, therefore, conclude that the litigation privilege associated with the surveillance material is waived when the defendant includes the surveillance material in his or her instructions to the health practitioner. I see productivity and no unfairness in this conclusion. If the defendant does not wish to waive what is left of the litigation privilege associated with surveillance evidence, then he or she should not send the surveillance material to the health practitioner.

[46] As noted above, in arriving at his conclusion that if the defendant provides the surveillance evidence to the health practitioner, he or she waives the litigation privilege associated with the surveillance evidence, Master Short relied on amendments to the *Rules of Civil Procedure* that responded to concerns about the partisan role of expert witnesses. Along with his reliance on the case law, which I discuss above, he reasoned that the recent amendments that require experts to provide non-partisan assistance to the court were reasons for the conclusion that surveillance evidence should be disclosed to the plaintiff.

[47] In advancing this argument, Master Short saw the Master's role as developing the law. In this regard, he considered but was not dissuaded by the majority judgment in *Adams v. Cook*, 2010 ONCA 293, where Justice Armstrong had declined to reform the law about defence medicals by making the video recording of a defence medical a routine practice. Rather, Justice Armstrong concluded that this was a matter best left for the Rules Committee. In contrast, in paragraph 45 of his reasons, the Master stated that he regarded it as his duty to provide guidance as to the proper approach to applying the rules while mindful of the concerns identified by Justice Armstrong in *Adams v. Cook*.

[48] In my opinion, it is not necessary to pursue this line of reasoning to arrive at the Master's ultimate conclusion that waiver of privilege occurs should the defendant send surveillance material to the health practitioner.

[49] In my opinion, the issue in this case turns on the timing of the waiver and disclosure of the surveillance evidence. The parties did not dispute that the surveillance evidence would be disclosed as an aspect of the health practitioner's report and that this disclosure was because the privilege associated with the surveillance had been waived. The dispute, in the case at bar, is about when the waiver occurs. As it happens, the conclusion that the waiver occurs when the information is provided to the health practitioner is consistent with the non-partisan role of the medical expert witness, but I do not rely on this consistency in arriving at my own conclusion.

D. CONCLUSION

[50] For the above Reasons, I dismiss the appeal.

[51] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of the Plaintiffs within 15 days of the release of these Reasons for Decision followed by the Defendants' submissions within a further 15 days.

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Perell, J.

Released: June , 2011

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