CITATION: Abu-Hmaid. v.Napar, 2016 ONSC 2894
COURT FILE NO. :CV-11-417723
MOTION HEARD: 20150512
REASONS RELEASED: 20160429

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

KHALID ABU-HMAID

Plaintiff

- and-

NISSIM NAPAR and DANIEL REIDY
and JOHN DOE and AVIVA CANADA INC

Defendants

BEFORE: MASTER D. E. SHORT

COUNSEL: D. Olivira Fax: (416) 367-1820
- for the Moving Defendant, Reidy
Eman Khoshbin Fax: (416) 250-1238
-for the Plaintiff

RELEASED: April 29, 2016

Endorsement on Refusals Motion

I. Overview

[1] The plaintiff was involved in 2 separate motor vehicle accidents in February and September of 2009. A single action was started on his behalf in 2011. Examinations for discovery of the plaintiff were held in July and September 2014. The defendants moved for 19 undertakings, and for items taken under advisement and 9 refusals.

[2] Undertakings and refusals motions are to a degree, the bane of many Masters' existence. Often, the purpose is simply to have a stick, which will provoke the other side into providing answers to undertakings given and then largely ignored by the party examined. The issues tat are actually argued are usually "close calls" and we endeavor to reach a just result that takes into account the overall substance of the action.

[3] By the time this matter got before me there were only 3 matters which had been refused or deemed refusals relating to 3 specific subject areas. One of the matters raised a somewhat novel issue in that it relates to the relatively new concept of Costs Liability Insurance. As a result I reserved my decision.

[4] Regrettably, owing to an oversight on my part, there an unfortunate delay in the release of this endorsement.

[5] However I am pleased to note that notwithstanding this situation, the action has been moving forward with a mediation having been completed and the action is presently booked for a Trial Scheduling hearing in June of this year.

II. Direction re Other Refusals

[6] On his examination for discovery the plaintiff acknowledged that in January 2012, while he was shopping with his family at a flea market, a male who he knew pushed him on the chest, "hard" with the result that he fell to the ground. The moving defendant sought access to police records concerning an alleged assault involving the plaintiff.

[7] Question 858 related to the police report and any Crown Brief concerning the incident. The transcript indicated that that documentation was going to be ordered by plaintiff's counsel. I expect by now the availability of those documents has been dealt with between the parties. If not I will convene a telephone case conference at any party's request to deal with whatever issues are outstanding in that regard.

[8] Counsel for the defence sought, at Q 1262, the name and address and last known contact information of the individual involved in that altercation. Counsel for the plaintiff refused asserting that if details of the physical injuries sustained were sought, that would appear in the hospital records, which were being produced. Applying proportionality. I am not satisfied that the details of the assailant are unlikely to provide any useful information that could be of assistance at trial. I am therefore upholding that refusal, but on the condition that if the plaintiff is *considering* calling that individual as a witness as to the severity of the attack, then the information is to be provided within 30 days of the release of these reasons.

[9] Similarly with respect to Q 1269, I am not satisfied as to the relevance of the name and address of the plaintiff's then girlfriend at the time of the altercation. Once again, if that individual is potentially going to be called by the plaintiff with respect to the altercation, then she is to be identified within 30 days of the date of the release of these reasons.

[10] If it is not yet produced, I am satisfied with the information and documentation is sufficiently relevant to assess the issue of "threshold" clearly needs to be produced. The effect on his present condition of the injuries he sustained as a result of the assault are in my view clearly relevant so that such documentation should have been obtained and produced, to the extent is available.

[11] The other issue related to the appropriate extent of a response to requests for supporting information supporting the claims for special damages and lost income. I suspect that this item is now moot, as the parties have already held a mediation at which time I expect that all such information was produced.

[12] Any other refusals argued before me are upheld.

III. Cost Insurance Disclosure

[13] The moving defendant's position concerning this coverage is outlined in the affidavit filed before me which asserts:

> 28. The defendant Reidy claimed costs of defending this action; however, the plaintiff refused to answer whether he has adverse cost insurance in relation to this action. As per Rule 30.02(3) of the *Rules of Civil Procedure*, a party shall disclose an insurance policy under which an insurer may be liable, to satisfy all or part of a judgment in the action, or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment. I verily believe that the plaintiff should be compelled to advise whether he currently has adverse costs insurance or whether he obtains such insurance in the future.

[14] In a May 2015 article in the journal of the Ontario Trial Lawyers Association, *The Litigator,* Alexander M. Voudouris wrote about the availability of such coverage:

> "It comes in varying names, it is offered by a handful of companies, and it is relatively new to the Ontario legal landscape. It has been referred to as legal costs protection, adverse cost insurance or even After the Event Insurance."

[15] Certainly many plaintiffs' counsel see this type of coverage as improving access to justice in the personal injury field. The author indicates that these various products "essentially provide insurance coverage to litigants who face paying costs [awarded] to a successful opponent on motions right through to trial."

[16] His observations continued:

> "Although I do not believe it has yet been tested in Ontario, in my opinion the premium would be recoverable as an item of special damage, although I suspect attempts will be made at claiming it simply as an assessable disbursement.
>
> Either way, I think our courts, in the name of access to justice, will find it difficult to deny such a recovery as it truly evens the playing field between individual plaintiffs and multi-billion-dollar insurers. No longer will the threat of costs force plaintiffs into either over-compromising on a settlement or even abandoning a claim altogether."

[17] He also addresses the developing issues relating to the specific question before me:

> "At least one of the policies that I am familiar with requires plaintiffs' counsel to disclose the policy's existence to opposing counsel on the theory that it will facilitate settlement. On the other hand, some defense counsel have proclaimed to me that the existence of this kind of insurance will only embolden insurers, knowing that should they prevail at trial, they will be able to realize on any subsequent cost order."

[18] The approach of plaintiff's counsel to voluntary disclosure may shift depending on

whether their client with other assets has costs protection insurance. For example, in the absence of a disclosure requirement, counsel may not want to share such information regarding an impecunious client.

[19] Those inconsistent possible approaches bring me to a consideration of the existing insurance disclosure provision in the *Rules of Civil Procedure.*

[20] Rule 30.02 (3) of the *Rules*, with my emphasis added, reads as follows:

> A party **shall** disclose and, if requested, produce for inspection any **insurance policy** under which **an insurer** may be liable,
>
> (a) to satisfy all or part of **a judgment in the action**; or
>
> (b) to **indemnify or reimburse a party for money paid** in satisfaction of all or **part of the judgment**,
>
> But no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

[21] Judgment is defined as in rule 1.03 as meaning: "a decision that finally disposes of an application or action on its merits, and includes a judgment entered into as a consequence of the default of a party." A judgment dismissing the action and awarding costs is still a judgment on the merits and thus the rule would seem to apply.

[22] However the purpose of the rule in my understanding was to avoid plaintiffs incurring substantial costs in obtaining "practically worthless" judgments as they were in excess of any available insurance coverage. The coverage here is for an entirely different category of liability.

[23] Perhaps endeavouring to avoid these apparent requirements with respect to "any insurance policy" at least one of the providers of such coverage state that they are providing "indemnity protection" rather than insurance coverage.

[24] To the extent that certain policies require routine reporting to the company offering the product, counsel will need to address avoiding any breach of solicitor client confidentiality rules by obtaining proper authorizations. That issue is but one of many other concerns thatneed to be addressed on a case-by-case basis until a general set of guidelines is determined for protection of this nature.

[25] In the meantime, it is necessary to address specific issues as they arise. Having considered the matter, I am of the view that the existence of such protection is relevant to the resolution of personal injury disputes, and ought to be disclosed at the same stage as disclosure by the defendant is required under Rule 30.02 .

[26] However, I am not convinced that with respect to this novel coverage, the specifics of the policy or the carrier are of any probative value in this case. It may be in the future that the factual situation in a case would justify the coverage quantum details equivalent to what is required by the rule with respect to tort claims.

[27] Applying proportionality together with Rule 1.04 (2) and my discretion under Rule 1.05, I think it is adequate to simply advise whether or not any coverage of this nature has been obtained, and to keep that information current, by way of an implied disclosure obligation up to the date of trial.

[28] I do feel, however, that there is at present "a distinction without a difference" between a policy that would provide "indemnification" under section under rule 30.02 (3) (a) and a policy that "insures" against the costs portion of a judgment in the action. Thus any contract providing similar coverage, regardless of what it is called, ought to be subject to this disclosure

requirement.

IV. Disposition

[29] The plaintiff is directed to answer the questions refused as set out above and to advise whether he currently has adverse costs indemnity or insurance coverage or whether he obtains such protection in the future.

[30] With respect to costs while success was somewhat divided, it appears that most undertakings were answered after the motion was brought and counsel for the defendant Reidy was justified in bringing the motion.

[31] I am therefore awarding costs to the defendant Reidy in the sum of $1500 (all in), but in the cause of the action as against him.

R.104/DS

Master D.E. Short