Court File No.: CV-20-00649404-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

ANN TOUSSAINT, APPOINTED REPRESENTATIVE OF THE ESTATE OF NELL TOUSSAINT, DECEASED, FOR THE PURPOSES OF THIS PROCEEDING

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

DEFENDANT'S CASE CONFERENCE BRIEF

(Case Conference: May 13, 2026)

Date: May 6, 2026

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Court File No.: CV-20-00649404-0000

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CASE CONFERENCE MEMORANDUM OF THE DEFENDANT

A. OVERVIEW

1. The Defendant, the Attorney General of Canada, seeks the Court's guidance on three discovery-related issues that must be resolved before the litigation can proceed. First, the Plaintiff has not disclosed the complete set of her medical records. In the Defendant's view, the Plaintiff is required to make all reasonable efforts to obtain and produce all medical records, both within Canada and abroad. Since she has not yet done so, she has not discharged her disclosure obligations. Second, the Defendant requests guidance on the timing of a summary judgment motion, which we will be bringing in short order. Our position is that this motion should be heard before any examinations for discovery take place, whereas the Defendant has served us with a Notice of Examination requiring the Prime Minister of Canada to attend an examination for discovery on June 9. Third, and relatedly, the Defendant requests that this Notice of Examination be quashed in any event, as the Plaintiff is not entitled to select the Defendant's discovery witness.

B. PLAINTIFF'S OUTSTANDING DISCLOSURE

2. In Canada's view, the Plaintiff has not fulfilled her disclosure obligations, as she has not made all reasonable efforts to obtain her medical records, both in Canada and abroad. This issue must be resolved before the litigation can proceed to the next steps.

3. The Plaintiff's complete medical records are plainly relevant to, among other things, whether and to what extent her inability to access the Interim Federal Health Program was causally connected to her subsequent health deterioration and death. They are also relevant to whether the *Charter* claims survive her death.

4. The Plaintiff has produced some medical records, but the production is incomplete. Though it is difficult to determine exactly what records are missing, we have not, for example, been provided with any hospital records from 2011 or 2016-2017. There are almost certainly other records missing, though it is unnecessary to particularize them for the purposes of this case conference.

5. The Plaintiff's position is that she has complied with her documentary discovery obligations because she has provided the Defendant with authorizations to obtain documents from various medical institutions. The Plaintiff appears to take the position that the documents that can be obtained by using these authorizations are deemed to be in the Defendant's power pursuant to Rule 30.01(1)(b). The Defendant disagrees.

6. The requirement that each party pay for the production of their own medical records is consistent with the general principle that each party funds its own case. [1] While there are some cases where the Court has ordered that the Defendant pay for the costs of

[1] *Gorin v. Ho*, 1983 CarswellOnt 503, 22 ACWS (2d) 339, 38 CPC 72; *Demirouglu v. Kwarteng*, 1999 CarswellOnt 4752 at para 12; *Hollo v. Toronto Transit Commission*, 2010 ONSC 1656, at para 20; *Trumble v. Soomal,* 2020 ONSC 8097; *Ho v. O'Young-Lui*, 2002 CanLII 6346 (ONSC); *Saunders v. John Doe*, 2016 ONSC 2060 (CanLII) at paras 20-21 (ONSC).

the production of the Plaintiff's medical records, most of those cases pre-date 2002.[2] There is no reason to depart from that general principle in this case, particularly given the salience of the medical records to both parties' cases.

7. At this juncture, the parties have reached an impasse on this issue and will require that the matter be settled by the Court. The Defendant proposes that this be done by way of a motion in writing, with timelines for the exchange of pleadings and evidence to be set by the Court at the case management conference.

C. TIMING OF CANADA'S MOTION FOR SUMMARY JUDGMENT

8. The Defendant has instructions to bring a motion for summary judgment in this matter. The parties disagree as to whether that motion should proceed before or after examinations for discovery. In the Defendant's view, the motion should be heard before any examinations for discovery for two reasons: it would be inefficient and a waste of time and resources and examinations for discovery are unnecessary for the presiding judge to reach a fair and just determination on the merits of the motion.

9. First, if successful, the summary judgment motion would obviate the need for examinations for discovery. Even if the motion is successful in part, it would narrow the scope of those examinations. It would therefore be inefficient to incur the time and expense of examinations for discovery before the summary judgment motion is determined.

10. In this regard, this Court's *ratio* in *Stantec* is apt:

> *[19] . . . Stantec has not provided evidence as to why discoveries are necessary at this juncture. . . . There is no reason to find that the plaintiff will be deprived of relevant documents it needs to put its best foot forward in resisting the defendants' motions. If the litigation proceeds thereafter, the determinations made on the*

[2] *Endale v. Parker*, 2022 ONSC 2008 at para 16.

> *motions would likely result in a more focused and streamlined discovery and trial process. . . . If, on the other hand, the defendants' motions are granted, or are partially successful, most or all of the outstanding issues between the parties would resolve, resulting in efficiency, affordability and judicial economy.*[3]

11. The same reasoning applies to the present case. Moreover, requiring a full trial to determine whether the Plaintiff's *Charter* arguments are subject to issue estoppel would defeat the doctrine's purpose of finality, permit duplicative litigation, and impose unnecessary cost and delay.

12. Second, summary judgment motions may properly proceed before examinations for discovery where, as in this case, the existing record permits a fair and just determination.[4]

13. Without limiting the arguments to be advanced on its motion for summary judgment, the Defendant intends, in broad terms, to take the following positions with respect to each of the Plaintiff's causes of action: (i) The *Charter* claims must fail because they are subject to *issue estoppel*; (ii) Even if a breach of customary international law could, in and of itself, form the basis for an action in domestic courts - which is unlikely - there has been no such breach in this case; and (iii) The Minister's decision not to adhere to the views of the ICCPR was reasonable. These issues can be decided based on a documentary record and do not depend on credibility assessments or live evidence.

14. Furthermore, the Plaintiff has already received the Defendant's documentary disclosure, and she will have full recourse to all means available under the *Rules of Civil Procedure* to put her best foot forward on the motion for summary judgment. Such means would include not only rights to conduct examinations under Rule 39, but also

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[3] *Stantec Consulting Ltd. v. Altus Group Limited*, 2014 ONSC 6111 at para 19.
[4] *Mara Technologies Inc. v. Eddy Smart Home Solutions Ltd*, 2025 ONSC 6565 at paras 25-28.

the right to require those persons to bring with them documents that were listed in a Notice of Examination under Rule 34.10, and the various uses a party might put to a request to inspect documents under Rule 30.04.[5]

15. In *Fehr v. Sun Life Assurance Co. of Canada*,[6] Perell J. refused to order discovery prior to a summary judgment motion, finding that under *Hryniak*, "other proportionate procedures may provide fair access to justice" and that based on proportionality principles, the disclosure on a summary judgment motion must be "fair" but not necessarily full or comprehensive. Moreover, rule 20.05(2) acknowledges that an affidavit of documents is not a prerequisite for a summary judgment motion but may follow an unsuccessful or partially unsuccessful summary judgment motion. The same applies even more so to examinations for discovery.

16. Once the issue of disclosure of the Plaintiff's medical documents is resolved, we are prepared to bring this motion as expeditiously as reasonably possible, and suggest the following timelines:

(a) Defendant's evidence – 2 months from the date productions are complete;

(b) Plaintiff's evidence – 4 months from the date productions are complete;

(c) Cross examinations to be completed 5 months from the date productions are complete;

(d) Defendant's factum – 6 months from the date productions are complete;

(e) Plaintiff's factum – 7 months from the date productions are complete.

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[5] *IML Roofing & Sheet Metal Systems Inc. v. The Regional*, 2019 ONSC 908 at para 56.
[6] *Fehr v. Sun Life Assurance Co. of Canada*, 2014 ONSC 2183 at paras 47-49.

D. NOTICE OF EXAMINATION

17. Regardless of the guidance provided by the Court on the first two issues, the Defendant requests that the Court quash the Notice of Examination as the Plaintiff is not entitled to choose the Crown's discovery witness.

18. On April 1, 2026, the Plaintiff served the Defendant with a Notice of Examination requiring the Right Honourable Mark Carney, Prime Minister of Canada, to attend an examination for discovery via Zoom on June 9, 2026, at 9:00am. However, as outlined in s. 7 of the *Crown Liability and Proceedings (Provincial Court) Regulations,* the Deputy Attorney-General has the authority to choose its representative for discovery. [7] This is in contrast to Rule 31.03(2) of Ontario's *Rules of Civil Procedure*[8], which applies to private litigants, permits an examining party to choose which corporate officer, director, or employee it wishes to examine.[9]

19. While the Plaintiff may ask this Court to replace the Crown's discovery witness *once one has been identified*, but even then, such relief should be granted only where the designated witness is demonstrably unsatisfactory. [10] In *Quadrangle*, the Court held that where the Crown has designated a witness to represent it on discovery, that designation "is entitled to deference and should only be interfered with in the clearest of circumstances."[11]

20. Therefore, the Notice of Examination requiring the Right Honourable Mark Carney to attend an examination on June 9, 2026 should be quashed as it is contrary to the above-noted principles and rules.

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[7] *Crown Liability and Proceedings (Provincial Court) Regulations*, SOR/91-604.
[8] *Rules of Civil Procedure*, RRO 1990, Reg. 194, r. 31.03(2).
[9] *Baylis Estate v. Canada (Attorney General)*, 2000 CarswellOnt 2283, [2000] OJ No 2531 at para 8.
[10] *Hubrisca Enterprises Ltd. v. Canada*, 1998 CanLII 3803 (BCSC).
[11] *Quadrangle Group LLC, et al. v. Attorney General of Canada*, 2019 ONSC 1478 at para 26.

21. There are many additional reasons why the Defendant cannot choose the Prime Minister as Canada's discovery witness. If the Court requires that this issue be addressed by way of a motion, Canada will particularize those reasons at that time.

E. COSTS

22. The Defendant submits that there should be no order as to costs.

Dated at Toronto, May 6, 2026.

Marina Stefanovic
Daniel Engel
Asha Gafar
Giancarlo Volpe
Of Counsel for the Defendant

2000 CarswellOnt 2283
Ontario Superior Court of Justice

Baylis Estate v. Canada (Attorney General)

2000 CarswellOnt 2283, [2000] O.J. No. 2531, 49 C.P.C. (4th) 179, 98 A.C.W.S. (3d) 49

The Estate of Todd Baylis, Deceased by the Personal Representatives of Said Estate, Edward Baylis and Sharon Baylis, Edward Baylis, Sharon Baylis, Cory Baylis, Janice Graham, Michele Leone, Cathy Leone and Antonella Leone, Plaintiffs (Respondents) and The Attorney-General of Canada and Clinton Gayle, Defendants (Appellants)

Swinton J.

Heard: June 27, 2000
Judgment: June 30, 2000
Docket: 94-CQ-55759

Proceedings: reversing (April 20, 1999), Doc. 94-CQ-55759 (Ont. Master)

Counsel: *Timothy S.B. Danson*, for Plaintiffs/Respondents.
Dale Yurka, for Defendant/Appellant, Attorney-General of Canada.
Sharon Haward-Laird, for Non-Party, Ian Glen.

***Swinton J.*:**

1 This is an appeal from a decision of Master Clark dated April 20, 1999 requiring Ian Glen to appear for examination for discovery as a representative of the federal Crown.

2 The plaintiffs have brought an action in negligence against the Attorney-General of Canada arising from the failure to deport Clinton Gayle, who shot and killed Police Constable Todd Baylis and wounded Police Constable Michele Leone on June 16, 1994. The Deputy Attorney-General designated Thomas Wilson, Regional Manager for Operations, Detentions and Removals, Immigration Canada, to be examined for discovery. Mr. Wilson is described in the reasons of the Master in the following words:

> In all matters relevant to the plaintiff's case, it is correct to say that in his daily work, Mr. Wilson was closer to the facts giving rise to this action than was Mr. Glen — with one very important exception.

That exception arose because Mr. Glen, former Associate Deputy Minister in the Department of Immigration, had undertaken an investigation following the shooting and filed a report with the Minister eleven days later, the substance of which was released to the public. The Master found that the report addressed issues of importance in the case — namely, the existence of a systemic failure in Immigration Canada at the relevant time.

3 Mr. Wilson had no first hand knowledge of the contents of the Glen Report, and he gave numerous undertakings to ask Mr. Glen for the information needed to answer the questions posed over the four days of his discovery. Mr. Glen has assisted when asked to do so. At the time of the motion before the Master, Mr. Glen was no longer working for the government. However, he has since returned to government service.

4 The plaintiffs were unhappy with the discovery process, especially the time taken to respond to undertakings. About 50 of the approximately 159 undertakings related to making inquiries of Mr. Glen. The plaintiffs characterized certain answers from Mr. Glen as unresponsive or flippant. Therefore, they brought a motion to compel answers to the undertakings, including those related to Mr. Glen, as well as to require that Mr. Glen be examined for discovery as an additional representative of the Crown

pursuant to Rule 31.03 or, in the alternative, as a non-party pursuant to Rule 31.10. There were lengthy hearings on the refusals motion, and no appeal has been taken from that aspect of the Master's order.

5 With respect to Mr. Glen, the plaintiffs complained that the discovery process had become clumsy and protracted, and, in effect, a Rule 35 examination using written questions and written answers. The Master accepted this argument, and ordered that Mr. Glen be examined as a representative of the Crown pursuant to Rule 31.03. In the course of his reasons, he stated that without examination of Mr. Glen, "it is well nigh impossible for the plaintiffs to have a full and fruitful oral discovery regarding the Glen Report." Even though Mr. Glen was not at that time an employee of the Crown, the Master concluded that he should be treated as if an employee, and his answers should bind the Crown.

6 The standard of review of a discretionary order made in an interlocutory proceeding is well-established. The Court should only interfere if the Master's decision was clearly wrong — that is, he exercised his discretion based on a wrong principle or misapprehended the facts (*Marleen Investments Ltd. v. McBride* (1979), 13 C.P.C. 221 (Ont. H.C.) at 222, 224)).

7 The Master made reference to, but did not discuss in any detail, the effect of s. 7 of the regulation under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as am. (SOR/91-604). Section 27 of the Act provides that the rules of practice and procedure of the court in which proceedings are to take place apply to those proceedings, except where the Act or the regulations provide otherwise. Examination for discovery is specifically provided for in s. 7 of the regulation:

> Subject to section 37 to 39 of the Canada Evidence Act, where, under the provincial rules, there is provision under which, if an action were an action between a corporation (other than an agency of the Crown) and another person, an officer or servant of the corporation could be examined for discovery, such officer or servant of the Crown or an agency of the Crown, as the case may be, as may be designated by the Deputy Attorney General or after such designation by order of the court, may be examined for discovery during an action subject to the same conditions and with the same effect as would apply to the examination for discovery of the officer or servant of the corporation.

8 In contrast to Rule 31.03(2) of the Ontario *Rules of Civil Procedure*, which permits the examining party to choose which corporate officer, director, or employee it wishes to examine, the Deputy Attorney-General is given the authority to choose the representative for discovery. A party who seeks to discover a different Crown representative must obtain a court order. In *Hubrisca Enterprises Ltd. v. Canada (Attorney General)* (January 23, 1998), Doc. Vancouver C964017 (B.C. S.C.), Edwards J. held that the court should order the discovery of another person only if the designated representative is "demonstrably unsatisfactory." He went on to say that the Crown's nominee must be accepted unless that person is not informed or not able to be informed (paragraph 21, as amended).

9 I do not read this test as more stringent than the test applied before the Court will order that a corporate party produce an additional representative for discovery. For an examination of an additional representative of a corporation to be ordered, the moving party must demonstrate that it can not otherwise obtain the discovery to which it is entitled. One of the purposes of a discovery is to obtain information about the case to be met. A second is to obtain admissions from the opposing party. The fact that the person whom the moving party seeks to examine may be an important witness at trial is not sufficient grounds for ordering an additional examination. It is only where the representative can not or will not satisfactorily inform himself that an additional representative will be ordered to be produced (*Lord v. Royal Columbian Hospital* (1981), 43 B.C.L.R. 147 (B.C. C.A.) at 150; *W. R. Grace & Co. of Canada v. Privest Properties Ltd.* (1992), 67 B.C.L.R. (2d) 345 (B.C. C.A.); *Northern Goose Processors Ltd. v. Canadian Food Inspection Agency* (2000), 145 Man. R. (2d) 63 (Man. C.A.), paragraph 30).

10 Therefore, the fact that Mr. Wilson had to give undertakings in order to answer questions related to the Glen Report does not lead to the conclusion that an additional representative should be produced for discovery, as it is inevitable that a representative of the Crown or a corporation will not be able to answer all questions posed on discovery. The usual process followed is to give an undertaking to obtain the information from the appropriate sources, as was done in this case.

11 In this case, the Master made no finding that the plaintiffs can not obtain from Mr. Wilson the discovery to which they are entitled. Indeed, the Master found that Mr. Wilson was the person who was best informed on the issues in the dispute, except

for the Glen Report. He also noted that Mr. Glen was cooperating with Mr. Wilson and providing answers. Where the answers were not as fulsome as the plaintiffs would have liked, the appropriate response would be a motion to seek better responses or a re-attendance by Mr. Wilson.

12 This is not a case like *Abitibi-Price Inc. v. Serada* (1984), 43 C.P.C. 217 (Ont. H.C.). There, a party would have been denied crucial evidence if it were not allowed to examine a different corporate witness with knowledge of the key matters in dispute. The reasons indicate that they would have been denied their right to know with certainty what the defence would be. Here, Mr. Wilson was the most qualified witness on the matters in issue between the parties. Mr. Glen had no first hand knowledge, as his report resulted from an investigation shortly after the shooting. While the report contains information useful for the plaintiffs' case, it was made after the events upon which the cause of action is founded and contains Mr. Glen's understanding of what happened from what he was told, as well as his opinions. This is far from the situation in *Abitibi-Price*, where the plaintiff sought discovery of a witness with actual knowledge of the events underpinning the litigation.

13 The Master adopted the plaintiffs' argument that it would be quicker and more expedient if the plaintiffs could examine Mr. Glen directly, rather than through answers to undertakings. However, that has not been the test in cases that have considered whether a second representative should be examined. Rather, the question is whether the first representative has informed himself or is able to be informed on the matters in dispute, so that the plaintiffs may have an effective discovery. As I have said earlier, the Master stated early in his reasons that Mr. Glen was assisting Mr. Wilson in responding to undertakings, and the Master never made a determination that Mr. Wilson could not adequately inform himself of the matters in dispute. Moreover, he ordered that the undertakings related to Mr. Glen be fulfilled, which must indicate that he believed Mr. Wilson could inform himself on matters within the knowledge of Mr. Glen.

14 In this case, the Master erred in principle in ordering the examination of Mr. Glen as a second representative of the Crown. Therefore, the appeal is allowed, and the order requiring Mr. Glen to attend for examination is set aside.

15 If the parties wish to speak to costs, they may make written submissions, or arrange an appointment through my secretary.

Appeal allowed.

1999 CarswellOnt 4752
Ontario Superior Court of Justice

Demiroglu v. Kwarteng

1999 CarswellOnt 4752, [1999] O.J. No. 3117, 42 C.P.C. (4th) 96, 99 A.C.W.S. (3d) 562

Ibrahim Demiroglu, Meryem Demiroglu, Muraar Demiroglu, Hanim Demiroglu, an infant by her Litigation Guardian, Ibrahim Demiroglu, Sibel Demiroglu, an infant by her Litigation Guardian, Ibrahim Demiroglu and Saban Demiroglu, an infant by his Litigation Guardian, Ibrahim Demiroglu, Plaintiffs and Seith Kwarteng, Defendant

Garton J.

Judgment: June 10, 1999
Docket: 96-CU-97671

Proceedings: affirmed *Demiroglu v. Kwarteng* (2000), 2000 CarswellOnt 5837, [2000] O.J. No. 4526 ((Ont. Div. Ct.))

Counsel: *David R. Richmon*, for Plaintiffs.
J. Sebastian Winny, for Defendant.

***Garton J.*:**

Endorsement

1 This is an appeal by the plaintiffs from an order of Master Peppiatt dated September 16, 1998, wherein the Master ordered, *inter alia*, that the plaintiff Ibrahim Demiroglu:

> a) produce the complete Workman's Compensation Board file (the "WCB" file) pertaining to him;
>
> b) produce the complete clinical notes and records of his family physician, Dr. Bergman; and,
>
> c) pay all costs associated with obtaining and providing clinical notes and records of treating physicians and other documentation requested by the defendant at the examination for discovery of the plaintiff held on March 3, 1998.

The action arises from a motor vehicle accident on February 9, 1994. The plaintiff alleges that he was struck by a defendant's motor vehicle as he was crossing a pedestrian crosswalk, and, as a result, has suffered serious and permanent injuries. The remaining plaintiffs assert claims under the *Family Law Act*.

2 The plaintiff makes broad allegations that he has sustained "severe internal and external injuries," including a back injury and a closed head injury, and asserts that his injuries constitute a "serious impairment of an important physical, mental or psychological function" so as to bring his claim within an exception to the general bar against tort action provided by s. 267.1 of the *Insurance Act*, as amended.

3 The accident in question was not investigated at the scene by the police. A report to police was made by the plaintiff on the following day, February 10, 1994. At the scene, the plaintiff asked for neither the police nor an ambulance to be called.

4 It is apparent from the examination for discovery that the plaintiff has some memory problems. He could recall very little about the accident itself and the medical history which followed it. He could not remember the date, the season, nor the time of day when it occurred. He was unable to recall whether anyone was with him at the time. He did not know his own address, the

ages of his wife and three children, or whether his children attended high school or university. At one point in his testimony, he stated that "my mind doesn't work."

5 The plaintiff's evidence on discovery was that after coming to Canada in 1986, he worked at a fruit company. He could not recall the name of the company, when he worked there or what his job was. However, he did state that he stopped working at this company because of a back injury. This work-related injury resulted in medical treatment and has prevented him from working up until the present day. He was still receiving a WCB pension at the time of his examination for discovery.

6 At the examination for discovery, the plaintiff, by his counsel, refused to obtain and produce a complete certified copy of the WCB file pertaining to him. There was also a refusal to produce any medical records whatsoever unless the defendant agreed to pay the cost of obtaining such records.

The Order to Produce the Complete WCB file

7 I agree with the Master that in the circumstances of this case, the plaintiff ought to produce a complete and certified copy of his WCB file.

8 The plaintiff is alleging that as a result of the February 9, 1994 accident, he has suffered injuries to, amongst other areas, his neck, shoulders, back and spine. It is alleged in the statement of claim that as a result of his injuries, the plaintiff's ability to earn a livelihood has been affected, and that he will continue to incur a loss of income. Two of the issues before the court will therefore be the injury suffered by the plaintiff to his back and his ability to work. As was noted by Granger J. in *Maksimov v. Berger* (1989), 68 O.R. (2d) 438 (Ont. H.C.) at 441, the provision of the *Worker's Compensation Act* require the Board to deal with injuries suffered by an employee and the extent to which such injuries have reduced his ability to earn a living. Granger J. concluded, as I do in this case, that since these are the very issues which will be before the presiding judge based on the pleadings in the action, the entire file of the WCB is relevant.

9 Counsel for the plaintiff submitted that the reasoning in *Maksimov* is not applicable since the defendant has been advised that the plaintiff is withdrawing any claim for back injury as a result of the accident. Reliance is placed on *Micheli v. Sheppard* (1994), 30 C.P.C. (3d) 297 (Ont. Gen. Div.). In that case, a solicitor for the plaintiff had indicated by affidavit that despite the broad pleadings, the only injury being complained of was with respect to the plaintiff's eye. The Court held that in the circumstances, the clinical notes and records of those doctors who had seen the plaintiff since the accident in relation to matters other than the eye injury need not be produced. In the present case, there has been no similar affidavit filed limiting the scope of the action, nor has there been a discontinuance of any part of the action pursuant to Rule 23. In addition, even assuming that the plaintiff did not intend to claim damages for a back injury, the statement of claim still alleges injuries to the neck and shoulders. At his examination for discovery, the plaintiff stated that he sustained bruising to his left side. The question arises as to what may be categorized as a back injury. Unlike the eye injury alleged in the *Micheli* case, the injury in the present instance is not so "isolated" or as easily defined.

10 The test for production pursuant to Rule 30.02(2) is very broad and provides that "every document relating to any matter in issue ... shall be produced for inspection." In my view, the Master was correct in ordering production of the WCB file.

The Order to Produce the Complete Clinical Notes and Records of the Plaintiff's Family Physician

11 The Master ordered the plaintiff to produce a complete copy of the clinical notes and records of his family doctor, Dr. Bergman. He noted that "in the circumstances of this action where the plaintiff has been unwilling or unable to provide much information about his medical history, the defendant is justified in asking for medical records going back further than might otherwise be the case." Again, I am in agreement with the Master's decision in this regard. Production of all of the doctor's records is appropriate in light of the broad injuries pleaded, the presence of his pre-existing injury, the plaintiff's limited memory with respect to his own medical history and treatment and the fact that Dr. Bergman's records go back no further than 1986 in any event.

The Order that the Plaintiff must pay the Costs Arising from the Production Ordered

12 Applying *McInerney v. MacDonald* (1992), 93 D.L.R. (4th) 415 (S.C.C.), the Master found that the medical records of the plaintiff's treating physicians were within the plaintiff's "power" as that term is defined in subrule 30.01(1)(b). The documentary discovery rules were thereby triggered. Pursuant to Rules 30.02(1) and (2), a party is obliged to disclose and produce for inspection, if requested, all relevant documents in his "possession, control or power." The Master held that "when a party is obliged to do something he must pay whatever cost is incurred in discharging that obligation unless there is a specific provision to the contrary in the Rules." He continued:

> It may be that there is an inherent discretion in the court to order otherwise although I have difficulty accepting the suggestion that there is a class of documents that are relevant enough to justify an order for production but not relevant enough that the producing party need not incur the expense of such production. To my mind *all* relevant documents in a party's possession, control or power must be produced; other documents need not be.
>
> Be that as it may, the documents which I have ordered the plaintiff to produce are only those which are clearly relevant and producible under the Rules; there is nothing out of the ordinary about them nor do they fall into any "grey area" if such there be. The plaintiff must comply with the Rules and this order at his own expense.

13 In my view, the Master was correct in his conclusion.

14 Counsel for the plaintiff emphasized in his submissions that the plaintiff is not relying on the documents in issue in order to prove his case. He argued that the cost of investigation should be with the investigating party and relied on the reasoning in *Schultz v. Galvin* (1988), 27 C.P.C. (2d) 253 (Ont. H.C.); *Bazzi v. Allstate Insurance Co. of Canada* (1994), 28 C.P.C. (3d) 166 (Ont. Gen. Div.); and *Pollard v. Esses* (1994), 35 C.P.C. (3d) 398 (Ont. Gen. Div.). In these cases, it appears that the relevancy of the documents sought was not entirely clear. For example, Kurisko L.J.S.C., in *Schultz v. Galvin*, asked, "How can relevance possibly be determined until the clinical notes have been examined? Only then can the relevance decision be made."

15 In the present case, the WCB file is relevant with respect to any injury suffered by the plaintiff to his back and to his ability to earn a livelihood. The medical records are also relevant. It is their relevance, the fact that they relate to a "matter in issue," which triggers the requirement for disclosure as well as production. In *Cook v. Ip* (1985), 52 O.R. (2d) 289 (Ont. C.A.), the Ontario Court of Appeal speaks of the importance of early disclosure of medical records and their relevance in personal injury cases. At 292, the Court states:

> There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the court. This is essential if justice is to be done between the parties. Wherever damages are claimed for injuries suffered, a review of the medical records is of vital importance to a court's decision. Evidence as to early diagnosis of injuries may be very important, for example, in cases involving head injuries, low back injuries or traumatic neurosis. Without production of all pertinent medical records, it may be impossible for either the plaintiff to prove his claim or for the defendant to determine the nature and extent of the injuries or to calculate the damages that flow from them. The production of medical records is thus fundamental to a court's determination of the nature, extent and effect of the injuries which may have been suffered and the appropriate measure of damages flowing from them.
>
> . . . . .
>
> No doubt medical records are private and confidential in nature. Nevertheless, when damages are sought for personal injuries, the medical condition of the plaintiff both before and after the accident is relevant. In this case, it is the very issue in question. The plaintiff himself has raised the issue and placed it before the court.

16 Counsel for the defendant has referred the court to a number of cases from other provinces in support of his position that the plaintiff should bear the cost of production. In *Royal Bank v. Waller* (1991), 74 Man. R. (2d) 32 (Man. Q.B.), Kroft J., after referring to Master Peppiatt's decision in *Hathway v. Bond* (1986), 11 C.P.C. (2d) 277 (Ont. Master) and to *Schultz v. Galvin*, stated at 34:

> After reviewing the decisions and considering the arguments of counsel, I have come to the conclusion that normally a party required to produce information should bear the cost of so doing.
>
> It is trite to observe that the philosophy pertaining to discovery has broadened over the years and that the more expansive approach has been embodied in the new *Queen's Bench Rules*. As already noted, the obligation to produce or provide answers is not in issue. The fact that there is a cost attendant upon a party discharging its obligations should not be permitted to defeat the policy of the *Rules*, unless, on the particular facts of a case, it can be established that the information sought is of such little relevance or the cost of producing it so unreasonably high that the burden should be shifted onto the party seeking the information.
>
> There will always be some cost attached to the discovery process, be it in researching answers or obtaining documents. Extra staff assistance, professional help, photocopying or other disbursements will be incurred. Those expenses should be considered at the end of the litigation process in the course of assessing costs. They should not be an excuse for curtailing discovery or production.

17 Similarly, in *Labrosse v. Eli Markovitch Professional Corp.* (1993), 20 C.P.C. (3d) 261 (Alta. Master), Master Waller disagreed with the approach taken by the Motions judge in *Schultz v. Galvin* that the defendant was required to reimburse the plaintiff for any medical fees and reasonable photocopying fees whether or not the documents were relevant. At 263, he concluded:

> A party's power over a document is that party's entitlement to obtain the document or a copy of it. The fact that there is a cost in obtaining it is irrelevant. To hold otherwise would permit parties to avoid production of relevant documents on the basis of cost.

18 In *Traverse v. Turnbull* (1996), 47 C.P.C. (3d) 205 (N.S. C.A.), the Nova Scotia Court of Appeal dealt with Rule 20 of that province's *Civil Procedure Rules* and the issue of which party should bear the cost of production of the plaintiff's various medical records. It is to be noted that Rule 20.01(4) differs somewhat from its Ontario equivalent in the sense that a true copy of a document must be attached to the affidavit of documents. It also includes the words "unless the court otherwise orders" — a specific reference to the discretion of the court in terms of issues relating to the production of documents. In any event, Hallett J.A., in speaking for the Court, considered a number of cases, including *Hathway v. Bond* and *Royal Bank v. Waller*. At p. 220 of the decision, he states:

> From a review of the cases in other jurisdictions, I have concluded that the rule requires that the party who has possession, custody or control of documents related to every question in issue is to produce those documents at that party's expense; it is the cost of being involved in a law suit. Depending on the outcome of the trial, those disbursements may be recovered as part of an award for costs.

19 Various exceptions to the rule are then discussed. Hallett J.A. continued:

> Pursuant to *Rule 20.01*(*4*) a court may relieve a party from the obligations of *Rule 20.01*. However, the *Rule* requires that a plaintiff must, at his or her expense, comply with *Rule 20.01* and produce documents in the plaintiff's possession or control that relate to every question in issue. Absent a court order, there should be no exceptions to the plaintiff's obligation to comply with the *Rule*. A similar rule applies to the defendant.
>
> The rule that the party in possession or control of documents must bear the expense of producing them applies with equal force to medical records of that party if the records are related to any question in issue in the proceedings. The exceptions I have mentioned also apply. The courts have applied *Rule 20* in a manner that balances the interests of the opposing parties.

20 Having considered the submissions of counsel and the case law cited by them, I am of the view that the cost of obtaining the documents in issue should be borne by the plaintiff. The fact that there is a cost involved in fulfilling the plaintiff's obligation to produce the records ought not to be the basis upon which the plaintiff can avoid this obligation. As noted in the Annotation

following *Schultz v. Galvin, supra*, at 255, there are significant costs with respect to meeting a party's other obligations under the Rules. For example, a party must pay their solicitors for the cost of reviewing and organizing documents for production and preparing the affidavit of documents. The same reasoning should also apply to relevant documents that are in a party's power or control. The appeal by the plaintiff is therefore dismissed.

21 If the parties cannot agree, I may be spoken to with respect to the matter of costs.

Appeal dismissed.

1983 CarswellOnt 503
Ontario Supreme Court

Gorin v. Ho

1983 CarswellOnt 503, 22 A.C.W.S. (2d) 339, 38 C.P.C. 72

Gorin v. Ho

Gorin v. Stewart & Cass

Master Peppiatt

Judgment: November 4, 1983
Docket: (Nos. 5000/82, 61326/80)

Counsel: *E. Belyea*, for plaintiff-respondent.
J. Wolfson, for defendant-applicant, Dr. Ho.
S. Secord, for defendants-applicants Stewart & Cass.

***Master Peppiatt*:**

1 This is a motion to compel the plaintiff to answer certain questions on his examination for discovery and to produce certain documents. The nature of the action is set out in the reasons of O'Brien J., dealing with an earlier application which is reported (1982) 31 C.P.C. 316. It is sufficient to say by way of setting out the facts that the plaintiff sues the defendant Dr. Ho for alleged negligence in the treatment of injuries received in a motor vehicle accident, which occurred on June 26, 1977, and sues the defendants solicitors, Stewart and Cass, for alleged negligence in failing to bring an action against Dr. Ho within the applicable application period. The injuries for which Dr. Ho treated the plaintiff were in the area of the jaw.

2 A number of the questions in dispute revolve around the issue of whose responsibility it is to obtain certain medical records relating to the plaintiff. It is the position of the defendants that the plaintiff is under an obligation to obtain those records while the plaintiff, while admitting that the records must be produced, takes the position that his obligation is limited to providing the defendants' solicitors with an executed consent for their production. In essence, as counsel agreed before me, it boils down to a question of which solicitor is going to write some half dozen letters to doctors and hospitals.

3 I must record my opinion that sensible and mature counsel should have been able to resolve this question by some means, even if only the toss of a coin, without burdening their respective clients with the costs of motion. Unfortunately, they have chosen the more expensive and time consuming route and I must settle the matter for them.

4 The question does not appear to have been decided previously as all of the reported cases deal with the issue as to whether the medical records are producible and there seems to have been no problem as to the mechanics of obtaining them once that issue is determined. In Parr v. Butkovich (1978), 20 O.R. (2d) 491, 6 C.P.C. 237 (H.C.), Carruthers J., ordered the plaintiff to execute written permission enabling the defendant to obtain a certain school record. In Brain v. Mador; Mamounis v. Groshaw (1982), 27 C.P.C. 265 (Ont. H.C.), Master Sandler, [in the decision appealed from, reported at p. 268] referring to Cruickshank v Noble (1980), 29 O.R. (2d) 604, said at p. 270 that the plaintiff is under an obligation to request certain medical records and to produce them. In that case, Master Sandler did not order the documents produced but was reversed by O'Brien J., in very short reasons and it was implicit that His Lordship ordered the plaintiff to undertake the task of obtaining the documents. In neither case, as I have said, does it appear that the issue was which party had the obligation to undertake the physical task of obtaining the documents.

5 In my opinion, as a general rule at least, this obligation rests upon the party who has the "possession, custody, or power" over the documents in question. I say this because R. 347 requires each party to deliver an affidavit on production relating to such documents and "to produce and deposit them with the proper officer for the usual purposes...". I am aware that this part of the Rule is seldom, if ever, complied with in our practice, but nevertheless it does place the obligation of obtaining such documents upon the party possessing them.

6 Similarly, R. 350 reads as follows:

> (1) A party is entitled to obtain the production for inspection of any document referred to in a special endorsement on a writ of summons in the pleadings or affidavits of the opposite party by giving notice to his solicitor, and is entitled to take copies of such documents when so produced for inspection (Form 32).
>
> (2) The party to whom such notice is given shall forthwith deliver to the party giving it a notice stating a time within two days from the delivery thereof at which the document may be inspected at the office of his solicitor, and shall at the time named produce the document for inspection (Form 33).
>
> (3) Inspection may also be ordered at such place as the court directs.

7 This envisages the party whose documents they are obtaining them so as to make them available for inspection.

8 In addition, I think the practicalities of the matter cast the burden upon that party. Experience has demonstrated that many doctors and hospitals, as well as other persons or institutions, are reluctant to produce documents relating to their patients, customers, etc., by reason of a well-meaning if sometimes excessive, desire to protect confidentiality. Common sense suggests that they will be more than likely to respond to a request from their own patient, etc., rather than to a request from some other person even when accompanied by a written consent.

9 It is possible that particular circumstances will arise in which the principle will have to be modified, but for the reasons which I have given, I think that that is the proper general rule. It is with that in mind that I turn to the specific questions in issue.

10 Question 57 requests the plaintiff to obtain the records from his family dentist. The reason given for this request is that such records may reveal a pre-existing condition in the injured jaw. The problem with this is that no such issue is raised by the pleadings and at Q. 53, the plaintiff was asked:

> Q. Now, have you had prior to June of 1977 any difficulty with any part of your jaw?
>
> To which he answered:
>
> A. No. I have not.

It is, of course, well settled that an examination for discovery is not a cross-examination. It is also often said that the examining party is not entitled to embark upon a "fishing expedition". Although that phrase is now hallowed by antiquity, it is, in my respectful opinion, an unfortunate one. An examining party is entitled to embark upon a "fishing expedition" provided that he has obtained a licence to fish in the particular waters. Such a licence is obtained by raising the issue to which he wishes to direct his questions in the pleadings. The prior state of the plaintiff's jaw is not put in issue in the pleadings and therefore, he will be ordered to produce the dental records only from the date of the accident.

11 At Q. 100, the plaintiff was asked to produce the emergency chart and other records of the hospital to which he was taken after the accident. There is no dispute that these are relevant records and the issue was whether the plaintiff had an obligation to obtain them or simply to execute a consent. I have held that he is under the former obligation and there will be an order to that effect.

12 The same principle applies to QQ. 286 and 287 and the same order will be made.

13 Question 300 is encompassed in the order that I have made respecting Q. 57 but for the sake of clarity, it is also ordered to be answered.

14 Question 329 was withdrawn by counsel for Dr. Ho.

15 Question 370 resulted in the same dispute as question 100 and the same order will be made as well as with respect to QQ. 375, 427, and 456.

16 At Q. 465, Mr. Gorin was asked to undertake to inform defendant's counsel if he received any further medical opinions and he refused to do so. In my view, such a question is proper as part of the process of continuing discovery mandated by the Divisional Court in Ont. Bean Producers Marketing Bd. v. W.G. Thompson & Sons Ltd. (1982), 35 O.R. (2d) 711, 27 C.P.C. 1, 134 D.L.R. (3d) 108 and such an undertaking must be given.

17 A consideration of QQ. 472 and 473 requires a reference to the statement of claim. In para. 8(c) the plaintiff alleges that Dr. Ho "failed to make sufficient observations on a regular basis to ensure stability of the wires and jaw relationship". At Q. 471, he was asked:

> Q. What frequency do you say should have been met to constitute sufficient observation?

He refused to answer that question on the grounds that he was being asked to give an opinion for which he was not qualified.

18 I do not think that this is a valid objection. It must be remembered that by R. 326 "a party to an action ... may ... be orally examined before the trial touching the matters in question ...". The Rule does not restrict such examination to matters within the party's own knowledge and he will often be required to disclose information which he has obtained from other persons. One of the purposes of examination for discovery is to permit the opposite party to know the case that he has to meet and this will often require the disclosure of that which a party will attempt to prove through expert evidence.

19 In this action, the crux of the plaintiff's case is the standard of care which, he says, the defendant doctor failed to meet. It is only fair that Dr. Ho should be told what the plaintiff alleges that standard of care to be so that he can decide whether to accept that or to challenge it through his own evidence and that of experts whom he may call. I respectfully adopt the statement of Master Davidson, as he then was, in Can. Gen. Elec. Co. v. Liverpool & London & Globe Ins. Co. (1977), 4 C.P.C. 45 where he says at p. 49:

> It is true that the witness is not an expert. However, on an examination for discovery, the opposite party is entitled to knowledge, information and belief and the witness has a duty to inform himself as to the facts and in a situation such as this where the defendants specifically plead a combination of fact and speculation as above described, I do not feel he can refuse to answer questions related to that defence and indeed to the plaintiff's claim.

This judgment was upheld by Krever J., at p. 51. The same principle was applied by Master Sandler in Peterborough v. Craig (1978), 14 C.P.C. 45 (Ont. M.C.). For that reason, QQ. 472 and 473 must be answered.

20 Although counsel for the defendant Ho withdrew Q. 329, counsel for the defendants Stewart and Cass asked that it be answered. There is no explicit statement on the record that the examination conducted by counsel for Dr. Ho was to apply in respect of the action against Messrs. Stewart and Cass, but I think that it is implicit that this was so. Otherwise, Miss Secord would have been compelled to repeat the questions asked by Dr. Ho's counsel and although she might well have the right to do so, it is not desirable to conduct examinations in this way if it can be avoided. I therefore hold that she is entitled, at least for the purposes of the motion before me, to adopt the examination conducted by Dr. Ho's counsel and to apply to have Q. 329 answered.

21 The question asks for information received from the plaintiff's wife as to his physical condition. In my view, this is not a proper question. The plaintiff is required to disclose all relevant facts, he is not required to identify the witnesses, whether he intends to call them or not, nor to say what other people's observations are. Question 329, therefore, need not be answered.

22 Question 595, which is in that part of the examination conducted by counsel for Messrs. Stewart and Cass, looks for the date of a meeting with a Dr. White prior to the plaintiff's first meeting with Mr. Stewart. The basis of the claim against Stewart and Cass is their alleged failure to issue a writ against Dr. Ho within the limitation period. By their brief statement of defence, they plead the Negligence Act, R.S.O. 1980, c. 315, without specifying the sections relied upon, but I infer for the purpose of claiming contributory negligence, and also deny that Mr. Gorin had a cause of action against Dr. Ho. This may well raise the issue of what information Mr. Gorin gave to Mr. Stewart and the medical opinions or information which he obtained before seeing Mr. Stewart is therefore relevant. The question should be answered.

23 At Q. 602, Mr. Gorin was asked who was present during a particular meeting. This is an attempt to obtain the names of witnesses and does not fall within any of the exceptions to the Rule that a party need not disclose that information. The question is, therefore, not to be answered. Question 617 must be read with the question and answer to Q. 616 as follows:

616. Q. When was the next contact with Mr. Stewart?

A. I couldn't say, really.

617. Q. What is your best approximation as to how long it took place after the second meeting?

24 On the advice of counsel, Mr. Gorin refused to answer that question and although the basis of the objection was not made entirely clear, it appears it was because his counsel thought he was being asked to make a guess. Miss Secord argues that she is entitled to Mr. Gorin's belief on this matter. It is often difficult to distinguish between a belief and a guess, but in this case, where the question of a limitation period is at the heart of the action against Stewart and Cass, I think that they are entitled to the plaintiff's best approximation, i.e., whether it was within a matter of weeks or a matter of months.

25 At QQ. 636 and 637, Mr. Gorin was asked for his position as to the date that the limitation period for commencing an action against Dr. Ho expired. His counsel advised him not to answer that question upon the ground that it is a matter for the Court to determine and this refusal was supported by the argument that is not a question of the law, but a question of interpretation of s. 17 of the Health Disciplines Act, R.S.O. 1980, c. 196. Although it appears at first blush to be very similar to the question concerning the proper observations that Dr. Ho should have made, I am persuaded that counsel for the plaintiff is correct on this issue. It is common ground on the pleadings that the writ issued by the defendants, Stewart and Cass, was issued on November 16, 1978. There is some suggestion in the statement of defence that it expired without being served but that is not an issue raised by the statement of claim which simply alleges that it was issued after the expiry of the limitation period. That being so, the issue is not when the limitation period expired, but rather whether it had expired before November 16, 1978, and I do not see that it is relevant to know exactly when, whether before or after that date, the limitation period intervened. That question, therefore, need not be answered.

26 Question 646 returns to the issue of when the plaintiff last saw his dentist before the motor vehicle accident. For the reasons which I have given with respect to Q. 57, that question need not be answered.

27 Question 649 asks for the hospital records with respect to certain surgery on Mr. Gorin's nose in 1969, eight years before the motor vehicle accident. The defendants, Stewart and Cass do not raise any defence based upon a pre-existing condition and I think, to revert to the phraseology which I used earlier, they have no licence to fish in those waters.

28 At Q. 655, Mr. Gorin was asked whether a Dr. Hubbard, whom he consulted after being treated by Dr. Ho "has any information with respect to complaints made by you subsequent to Dr. Ho's surgery on July 1, 1977?" It is, of course, quite proper to ask Mr. Gorin if he made any complaints to Dr. Hubbard. However, it is not proper to ask Mr. Gorin what Dr. Hubbard's testimony will be or what his information is.

29 Question 663 was withdrawn.

30 There will, therefore, be an order in the terms which I have set out. I think that it is unfortunate that time had to be taken to determine whose obligation it is to obtain admittedly relevant records. I cannot, however, say whether the blame for this is more attributable to one party than to the other. For this reason, and because success has been fairly evenly divided, costs in the cause.

Order accordingly.

CV-20-00649404-0000

TOUSSAINT (ESTATE OF)	AND	ATTORNEY GENERAL OF CANADA
Plaintiff		Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

CASE CONFERENCE BRIEF OF THE DEFENDANT

(Case Conference: May 13, 2026)

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