Superior Court of Justice
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FROM:	Joan Russell Judicial Secretary	DATE:	Sept.16/15
		PAGES:	8 incl cover page

RE: Ghadghoni et al v. 621198 Ontario Inc. o/a as Mount St. Louis Moonstone Ski Resort

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Please find attached the Decision of Justice H.K. O'Connell in the above-named matter.

CITATION: Ghadghoni v. 621198 Ontario Inc., 2015 ONSC 5132
COURT FILE NO.: CV-07-083324-00
DATE: 20150916

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
SAIED GHADGHONI, MOHAMMAD GHADGHONI, ALI GHADGHONI, minors by their litigation guardian, Vahid Ghadgoni and NADIA GHADGHONI, LAYLA GHADGHONI, FARKHONDEH MEHRICHOMBOLI and VAHID GHADGHONI personally	J. Sprague for the Plaintiffs, Responding Parties on Motion
Plaintiffs, Respondents on Motion	
– and –	
621198 ONTARIO INC operating as MOUNT ST. LOUIS MOONSTONE SKI RESORT LTD. , CANADIAN SKI PATROL SYSTEM, JUDITH TOMLINSON the ESTATE TRUSTEE OF R.D. TOMLINSON and PAUL SOLARSKI	P. Pollack for the Defendants, Moving Parties on Motion
Defendants, Applicants on Motion	

Heard: March 10, 2015

DECISION

H.K. O'CONNELL J.

[1] Once this motion came on for hearing, there was only one outstanding issue between the parties. It related to a question and the taking of it under advisement by counsel for the plaintiff, Saied Ghadghoni during the discovery of the plaintiff on January 10th 2012.

[2] That 'taking under advisement' became a refusal to answer. Counsel worked out other refusals just before I heard the matter on March 10, 2015. I signed an order dealing with the issues upon which counsel reached consensus inclusive of costs in relation to those issues.

[3] The following extract of the examination for discovery of June 2012, at pages 340-41 of the transcript, which is set out for convenience at *Tab G* of the respondent's motion record, is as follows and forms the substance of what is now the refusal to answer:

Q: (by Mr. Olah) Do you have a Facebook site, or had?

A: Yeah, I had.

Q: when did you stop using Facebook?

A: End of high school. Probably on and off sometimes, but never really using it. You know, you would go on and off all the time, right.

Q: All right, I would like to have a print-off of the latest Facebook or My Space site if it has any relevant information, Mr. Romaine, about what he does, what he is involved in--.

A: I don't like getting my privacy---my private life---

Mr. ROMAINE: Hold on, Saied, you have to let him finish.

BY MR. OLAH:

Q: All right. So I would like you to review it, and if there's anything relevant there that bears on his condition or his snowboarding abilities, I would like to have a copy of it, all right.

Mr. ROMAINE: Sorry, that bears on his snowboarding ability?

Mr. Olah: Snowboarding ability and---

The Witness: How does----

Mr. ROMAINE: Hold on.

Mr. OLAH: -- or his damages, then I would like to have a copy of it, please.

MR. ROMAINE: Okay, what I'll do is take it under advisement. One issue that I have is I don't even know if Saied knows his account user name password because it's been a number of years, so I'll work with him to try and access it, and make the review and provide you with my opinion.

----- Under Advisement No. 3-----

Position of the Moving Party, the Defendants

[4] Mr. Pollack notes that this action arises as a result of a 2001 accident. It involves a catastrophic injury. Discoveries are now complete. Mediation occurred. Without success. The action is now finally moving toward trial.

[5] The issue before the court is document production. Would the Facebook entries or MySpace profile of the plaintiff have relevance to the issues at trial?

[6] It is clear that the plaintiff did use Facebook. The plaintiff does not allege physical limitations as a consequence of his injury. The transcripts suggest that the plaintiff continues to engage in snowboarding and possibly other physical activity. The defendants are cognizant that the plaintiffs' argue that they are not alleging that the plaintiff has suffered any physical limitations and as a consequence it is their position that it is irrelevant that physical activity occurred post injury.

[7] The defendants argue that activities of the plaintiff go well beyond physical limitations. Future care and supervision is a massive part of the plaintiff's claim. It is claimed that constant supervision and 24 hour care are required for the Plaintiff. The defendants argue if the plaintiff can snowboard by himself and engage in activities, then the trier of fact can draw an inference that the plaintiff is not only not physically limited, (which is a non-issue) but in particular that the plaintiff's realistic and reasonable future care expenses are very much in question.

[8] If the plaintiff has snowboarded post- accident, which appears to be the case, the extent of that activity can lead to a serious inference to be drawn re future care costs inclusive of the need for, or extent of, the supervision required. In that respect Facebook and My Space postings are "wholly relevant." The trier of fact ought to be able to assess the information about the activities of the Plaintiff to assess whether future care costs and supervision are realistic and if so to what extent.

[9] Mr. Pollack handed up three cases in support of his argument. The first case is *Leduc et. al*,[1] a decision of Brown J. as he then was. Counsel reviewed the decision of Brown J. inclusive of the reasons of Master Dash in first instance. The decision speaks to the production of Facebook postings in civil litigation.

[10] In *Parsniak and Pendanathu*[2], Justice Gordon refers to the fact that the plaintiff had photos of herself from and before the accident. That feature is analogous to the case at bar. At paragraph 19, Gordon J. stated:

> The benefit of pre-accident and post-accident photographs ought to be obvious. The plaintiff claims to be unable to participate in the activities enjoyed prior to the accident and to a change in socialization.

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[1] Toronto Court File 06-CV- 3054666PD3, February 20, 2009

[2] Hamilton Court File 08-2616, July 26, 2010

[11] Mr. Pollack argues that although physical limitations of the plaintiff are not in issue in the case at bar, the issue of activity that does not require supervision is material to the litigation and the claim of the plaintiff.

[12] In *Macdonell and Levie et. al.*[3] the court also spoke to the issue of Facebook productions relevancy and whether such evidence ought to be produced. In *McDonnell* the issue was whether the plaintiff should have to produce photos of herself engaged in activities.

[13] At paragraph 6 of that case the court refers to the basic rule of relevancy to any matter at issue, inclusive of considering the requirement of proportionality. At paragraph 15 the court noted that it agreed with the analysis in *Parsniak* and *Leduc* that where the plaintiff puts her social life in issue and alleges various activities that she is unable to do, postings on social media are producible as having some semblance of relevance.

[14] The defendants says it is quite clear in reading the pleadings and the position of the defendant that the trier of fact requires this information so that the trier can assess what the plaintiff is or is not able to do and in particular in relation to the issues of future care and supervision. It is a huge component of the damages of the plaintiffs. This says Mr. Pollack, renders relevancy applicable.

[15] The production is therefore relevant, and appropriate.

Position of the Responding Party, the Plaintiff

[16] Counsel argues that the transcript does not speak to future care costs but only to snowboarding. There is no evidence as to why future care costs is a genuine issue as it relates to the plaintiff's ability to snowboard. Case law suggests that the rational for a refusal needs to be in the discovery transcript or at least in the affidavit evidence.

[17] In the case at bar, the plaintiff is "somewhat blindsided" by why Facebook and Myspace video/photos are relevant.

[18] The affidavit evidence in the plaintiff's case, at paragraph 4 that while the allegations are physical and mental impairment, it is clear from the discovery and the expert reports that the issues have narrowed. The substance of the plaintiff's claim relates exclusively to psychological and mental impairment. It is clear that the plaintiff was able to snowboard both before and after the accident.

[19] The plaintiff's judgment and his relationship with his family and friends has been affected by the accident. This is a case of traumatic brain injury causing mental changes, but no physical impairment.

[20] There is a video taken by the defendants which shows the plaintiff snowboarding, post-accident, which shows jumps and tricks being performed. In the supplementary affidavit

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[3] 2011 ONSC 7151 CarswellOnt 15142

of Dr. Feinstein, he references surveillance video that shows the plaintiff engaging in sporting activities and different physical activities, yet the Doctor's conclusion is that in the circumstances of cognitive functioning and poor judgment, surveillance of physical activity has limited value. This opinion of Dr. Feinstein, argues Mr. Sprague, goes to the issue of relevance of the productions requested, and why relevance is not established.

[21] What the defendant is seeking to do on this motion is to go on a fishing expedition. The test is no longer one of a "semblance of relevance" but "relevance". The cases presented by the defendant are all grounded on the prior test of semblance of evidence.

[22] In this regard, Master Muir in the decision of *Garacci v. Ross*[4] denied a defendant's motion for access to Facebook because it was found not to be relevant. This case is, argues Mr. Sprague, on point with our case. There is simply no indication that the Facebook postings or MySpace content would be helpful in the case at bar. It must be remembered that physical disability is not an issue in our case.

[23] Dr. Feinstein addresses the defence medicals in his report. The defence practitioner opines on maladies that the Plaintiff suffers. These are the issues that the court will have to deal with, and have nothing to do with physical limitations.

[24] The requests of the defence are simply much too "tenuous." Master Muir references at paragraph 9 of *Garacci*, the Superior Court of Justice case of *Stewart v. Kempster*, 2012 ONSC 7236 CanLII.

[25] Master Muir notes that the request for Facebook access was extremely broad and was tantamount to a "high tech fishing expedition", which was nothing more than an attempt by the defendant to "rummage through 1100 of Christina's personal photographs in the hope that something useful or interesting might turn up. That is not an appropriate or proportional form of discovery."

[26] Mr. Sprague summed up by saying that the logic of Master Muir is transferable to our case.

Reply

[27] In *Garacci*, the plaintiff argues that that case is the leading authority, however in that case the Master had the photographs before him for his review. He was then able to determine relevancy after review of the photos.

[28] In addition in paragraph 9 of *Garacci*, the Master referred to the fact that the request was for every photograph taken of that plaintiff since her accident, which is not our case at all. A fair reading of the case of Master Muir indicates that is why there was an outright refusal of the court to order production of Facebook pictures.

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[4] 2013 ONSC 5627 (CanLII)

[29] The issue before the court on this motion is a straight out refusal to produce which requires the defendant to seek production via this motion.

[30] What the defendant wants in this case is very circumscribed. It is relevant to future care costs and supervision. It is only those particular pictures and postings and video requested that relate to those issues.

[31] The independence of the plaintiff is very relevant on this motion. The claim is for 24 hour care and supervision.

[32] Any pictures or productions relating to the damages are therefore being sought. If they exist they should be produced. One cannot forget that this claim is for $10 million in damages.

Reasons

[33] I agree with the position of the defendant. I am satisfied that on the test of relevancy the pictures and video sought to be produced are relevant. Although physical impairment is not an issue, and even though Dr. Feinstein has opined on the issue of physical activity, the fact remains the claim seeks $10 milllion in damages inclusive of the assertion that the plaintiff requires 24/7 *supervision and care*.

[34] It may be that the production of photos or video as sought at discovery will serve no useful purpose in due course, however that is not a known until they are produced, nor is it a reason to discount the relevancy that I find has been shown for production.

[35] This court cannot say that they are not relevant. I am well aware the test is now relevance and not the semblance of relevance, and that the cases cited by the defendant fall under the former semblance of relevance test.

[36] My task is not to weigh the opinion of Dr. Feinstein with that of the argument of the defendants. Dr. Feinstein's opinion in due course may rule the day, but it cannot dislodge the relevance standard having been met on this motion. I am of the view that given this claim, and the supervision and care issues, that the productions are relevant. They are also not disproportionate to the issues in contest.

[37] It will be, as Mr. Pollack agues, ultimately up to the trier of fact to ascertain the weight to be given to those productions, and it may well be that the productions are such that they may have limited utility to the defendants once reviewed. However unlike *Garacci*, the request for productions is not a "high tech fishing expedition" nor is it equivalent to using a tuna net to catch a minnow.

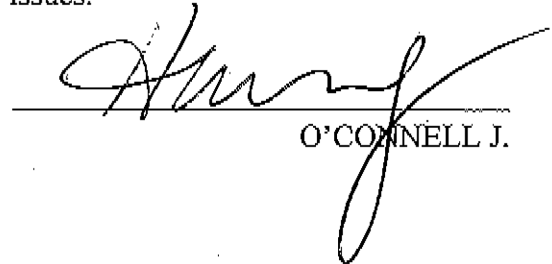
[38] It is rather a very limited request founded on the answers given by the plaintiff at his discovery.

[39] The productions sought from the plaintiff will therefore be obliged. I am hopeful that that can be achieved within 30 days of release of these reasons.

[40] The defendant to submit its bill of costs to my attention within 10 days of receipt of this endorsement, totalling 2 pages plus submissions. The plaintiff to respond within 20 days or service of the defendants materials.

[41] Given that counsel worked out the other issues just before the commencement of the motion before me, and costs of those other issues, I am hopeful that they can work out the costs in relation to the motion.

[42] Finally, as I said at the motion Mr. Pollack and Mr. Sprague are to be commended for the manner in which they dealt with the totality of the issues.



O'CONNELL J.

Released: September 16, 2015