Medical Records And ICBC Injury Claims

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ICBC Injury Claims tend to be record heavy. It is important to understand the types of records that are typically used in ICBC claims and how these records can be used.

One of the most frequent records reviewed and used by lawyers involved in these cases are clinical records of treating physicians. These records can be a rich source of information documenting a person's complaints of injury, course of improvement, medical advice prescribed and other useful information.

When ICBC claims proceed to trial these records are often put to some use by the lawyers involved. The extent to which each lawyer can use the records varies. For example, a Plaintiff's lawyer usually can't use the records to corroborate the Plaintiff's evidence at trial as doing so can offend the rule of bolstering a clients credibility by leading evidence of 'prior consistent statements'.

ICBC Defence lawyers, however, often use prior recorded statements when cross-examining a Plaintiff with respect to injuries sustained in an ICBC claim. This is one of the most frequent uses made of clinical records in ICBC claims.

Reasons for judgment were released today by the BC Court of Appeal shedding light on this topic. In today's case the Plaintiff was awarded damages as a result of a 2005 motor vehicle collision. The defendant appealed claiming that the damages awarded were excessive in the circumstances and that the trial judge made several errors. In dismissing the appeal the BC Court of Appeal noted that while some errors were made none of these prejudiced the Defendant in the trial. In doing so the court made some comments on the use to which clinical records can be made at trial. I reproduce the highlights of this discussion below:

Medical Records Issues

[7] During cross-examination of the plaintiff's family physician, Dr. Dwyer, counsel for the defendant asked to have his clinical notes admitted as an exhibit. Counsel stated that the defendant intended to rely on the absence from the notes of any notation of a complaint by the plaintiff related to limitations on his work capacity, particularly with respect to script writing. Dr. Dwyer testified that he would have noted such complaints if they had been made to him. Counsel argued that the clinical notes were admissible as business records under s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124. The trial judge questioned the admissibility of the portions of the notes that recorded the plaintiff's complaints of symptoms. He distinguished between the doctor's notes of the results of his physical examination of the plaintiff and notes of the plaintiff's subjective complaints to the doctor. The trial judge considered the plaintiff's statements to be hearsay. He questioned the evidentiary value of the records apart from the doctor's testimony, pointing out that the doctor was entitled to refer to his notes to refresh his memory and "there's nothing preventing you from exploring all of these questions with this witness."

[8] The trial judge summarized his conclusions as to the attempted use of the notes to discredit the plaintiff's account of symptoms in these terms (at paras. 35 to 37):

I accept Mr. Bancroft-Wilson's evidence in regard to the onset of the headaches, and their intensity, frequency, and endurance. Efforts to discredit him with alleged inconsistencies in doctors' clinical notes were, in my view, not successful. It must be borne in mind that the primary objective of physicians' clinical notes is to refresh their own memories as to what transpired during a clinical examination, for the purposes of medical treatment. These notes are not made for investigative and litigation purposes. If this were the purpose then it would, in my opinion, be important for physicians to ensure that they have accurately recorded full and detailed accounts of what a patient said during a clinical visit and then have the patient verify the accuracy of the notes.

Physicians are not investigators. They are neither trained to accurately record what a person says nor to draw out a fulsome account for litigation purposes. The use of clinicians' notes, made hastily during a clinical visit and never reviewed for accuracy by the patient, may operate unfairly to the patient as plaintiff or witness. It should also be borne in mind that when a patient sees his or her physician with a complaint of significant pain, the circumstances are far less from ideal for obtaining full and accurate information.

I do not suggest by any of the foregoing that it is impermissible to use clinical notes to challenge a plaintiff's credibility, but the frailties inherent in such recordings should be recognized. In the instant case, I find that the clinician's notes do not have sufficient accuracy and reliability to undermine the plaintiff's evidence where the notes allegedly differ from the plaintiff's testimony at trial.

[Emphasis added]

[9] The defendant contends that the trial judge erred in law by refusing to admit the clinical notes as admissions against interest. This Court in Samuel v. Chrysler Credit Canada Ltd., 2007 BCCA 431, 70 B.C.L.R. (4th) 247, has recently confirmed that statements made by a plaintiff to doctors and recorded in clinical notes are hearsay and not admissible by the plaintiff to prove the truth of the symptoms complained of to the doctors. The Court in Samuel was not concerned with the exception to the hearsay rule for admissions against interest. Statements made by a plaintiff to doctors may be admissible under that exception when tendered for that purpose by the defendant or other party opposed in interest to the plaintiff; see Cunningham v. Slubowski, 2003 BCSC 1854 at para. 14.

[10] I do not read the trial judge's reasons as categorically rejecting the admissibility of clinical notes as a general proposition. Rather he addressed the evidentiary weight of the notes. I think that he went too far in the sentence underlined above when he stated that clinical notes are not made for investigative and litigation purposes. That overlooks the fact that all of the medical doctors who testified, apart from Dr. Dwyer, were retained to provide independent medical opinions for the purposes of litigation. Complaints of symptoms by a plaintiff to doctors must be supported by confirmation of those symptoms by the plaintiff's testimony in court to provide an evidentiary foundation for the medical opinions; see, for example, Lenoard v. B.C. Hydro & Power Authority (1964), 50 W.W.R. 546 (B.C.S.C.). Nonetheless, the accuracy of the doctors' record of complaints is important to their opinions, and to that extent accuracy has obvious litigation implications.

[11] While clinical records may be admissible as a record of admissions against interest in appropriate circumstances, in the instant case the defendant seeks to rely on the clinical notes to support the inference that the plaintiff did not complain to the doctor of the symptoms he alleges because the notes do not contain any reference to those symptoms. In effect, the defendant is contending for an admission by omission. In my view, that overstretches the limits of the admissions exception in the circumstances here. The notes standing alone are of little if any weight for the purpose intended by the defendant and I think that the trial judge adopted the proper course in limiting their use to refreshing the memory of the doctors during their testimony.

[12] Viewing the trial judge's reasons as a whole on this aspect of the case, I am satisfied that he did not reject entirely the admissibility of the clinical notes and he treated their significance as a matter of weight in the context of the doctors' testimony. For example, the trial judge observed that Dr. Dwyer's notes supported the plaintiff's complaint of back pain within four days of the accident. The judge advised counsel for the defendant that she could renew her application to admit the notes later and counsel did not take up that opportunity. I think that any evidentiary value attached to the notes was merged in the testimony of the doctors and there was no prejudice to the defendant arising from their formal inadmissibility as admissions against interest.