Supreme Court

New South Wales

Case Name:	Haragli v Tan
Medium Neutral Citation:	[2021] NSWSC 1581
Hearing Date(s):	03 December 2021
Date of Orders:	07 December 2021
Decision Date:	7 December 2021
Jurisdiction:	Common Law
Before:	Harrison J
Decision:	(1) Dismiss plaintiff's application to set aside paragraph 4 of the defendant's subpoena. (2) Order that costs of the motion are to be the defendant's costs in the proceedings. (3) Permit the plaintiff to rely upon the late served report of Dr Champion, who may participate in the relevant expert conclave.
Catchwords:	CIVIL PROCEDURE – medical negligence – subpoena – where defendant sought production of plaintiff's diaries and journals – where plaintiff moves to set aside subpoena in part – whether legitimate forensic purpose for subpoena – whether category of documents too broad – whether nature of documents sought illegitimately infringed the plaintiff's privacy – whether impractical for plaintiff's lawyers to respond – plaintiff's motion dismissed
Legislation Cited:	Limitation Act 1969, s 50C
Cases Cited:	Lowery v Insurance Australia Ltd [2015] NSWCA 303 Secretary of Department of Planning, Industry and Environment v Blacktown City Council [2021] NSWCA 145

Category:	Procedural rulings
Parties:	Ophelia Fatima Haragli (Plaintiff) Clifford Tan (Defendant)
Representation:	Counsel: A Stone SC (Plaintiff) K Kumar (Defendant) Solicitors: Burgan Lawyers (Plaintiff) HWL Ebsworth Lawyers (Defendant)
File Number(s):	2017/187977
Publication Restriction:	Nil

JUDGMENT

1 **HIS HONOUR:** Ophelia Haragli sues Dr Clifford Tan, her treating general practitioner, for damages alleging, in short compass, that he failed to diagnose and treat her properly when she presented to him on 22 May 2008 expressing concern about the condition of her left breast. In the events that occurred, Ms Haragli was later diagnosed with breast cancer and she ultimately underwent a double mastectomy on 18 November 2011. She alleges that her condition should have been detected and diagnosed much earlier and that the injuries and disabilities from which she now suffers could have been avoided by the exercise of reasonable care. Dr Tan has denied that he was negligent. He also claims that he acted at all times in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice.

2 These proceedings are listed for hearing commencing on 1 February 2022. Dr Tan has issued subpoenas to some of the terms of which Ms Haragli objects. By her notice of motion filed on 30 November 2021 she seeks the following orders:

> 1. That paragraph 4 of the subpoena to produce documents issued by the defendant upon the plaintiff returnable 3 December 2021 be struck out.
>
> 2. That the entirety of the subpoena issued by the defendant upon NSW Police returnable 3 December 2021 be struck out.

3. That any documents produced by NSW Police to the registry, pursuant to the subpoena returnable 3 December 2021, be returned to police or destroyed by the registry without production to either party.

4. The defendant to pay the plaintiff's costs of this notice of motion on an indemnity basis forthwith.

3 Ms Haragli no longer requires any orders with respect to the documents sought from the Commissioner of Police. That is because the parties have come to an arrangement concerning those documents to which it is unnecessary to refer.

4 Paragraph 4 of the subpoena addressed to Ms Haragli seeks production of "all diaries, journals, yearly planners and calendars kept by [her] from 1 January 2010 to date". Mr Stone of senior counsel, who appears for Ms Haragli, objects to the production of these documents for the following reasons.

5 First, Mr Stone submits that the subpoena seeking production of any such documents can have no legitimate forensic purpose. He maintains that the subpoena is no more than a fishing expedition seeking to discover something that may or may not exist. He emphasised that Dr Tan only became aware of the existence of Ms Haragli's diaries and journals in correspondence exchanged after the subpoena was issued.

6 Secondly, Mr Stone submits that the subpoena is too broad. It seeks documents for what amounts to an 11 year period through which he maintains Dr Tan wishes to trawl in the hope of finding something that may assist his case. By inference, he would not object on this ground if the period of the request were more limited.

7 Thirdly, Mr Stone submits that the very nature of the documents asked for carries the unacceptable risk that they may contain sensitive personal information that is unrelated to either her claims in these proceedings or Dr Tan's response to them and that her privacy ought in the circumstances be the standard by reference to which this application is decided. Mr Stone has raised the rhetorical inquiry about whether there are or should be limits to what a defendant in personal injury litigation can be required to reveal. Medical records are obviously not protected by a claim that they are private and thus beyond the reach of a subpoena. He argues that the requirement that any

plaintiff should have to produce a journal of private recollections and recordings is a step too far.

8 Finally, Mr Stone maintains that it is impractical, if the documents are to be produced, to require Ms Haragli's legal advisers to review eleven years of diary entries "if they exist, making judgment calls on each and every entry as to whether they fall within the scope of [the] description" contained in a letter dated 1 December 2021 from Lauren Jefford to Ms Haragli's solicitors. That limited description is to be found in the following paragraph from the letter:

> "Having regard to the nature of the pleaded disabilities, which are in issue in the proceedings, we are agreeable to limiting paragraph 4 of the subpoena to the plaintiff to any diary entries from 18 November 2011 (which is the date on which she commenced her treatment for the breast cancer with the effect of the treatment on the plaintiff being a substantive issue in these proceedings) which make reference to the plaintiff's physical functionality and ability to undertake tasks, exercise or participate in activities within and outside the home, her mental state, her socialisation and relationships with family, friends and others, her engagement with the community, her involvement in any intimate relationships, her feelings of attractiveness, any assistance with personal care or domestic tasks provided to her by others, and any employment opportunities available to her or employment undertaken by her. Please advise us whether the plaintiff is agreeable to limiting paragraph 4 of the subpoena in these terms."

9 Ms Kumar of counsel, who appears for Dr Tan, responded to these points in turn.

10 With respect to the proposition that the subpoena could not be linked to the existence of any legitimate forensic purpose, she referred to certain passages from the judgment of Bell P in *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 at [65]-[69] as follows:

> "[65] It is sufficient, in my view, to justify a subpoena as having been issued for a legitimate forensic purpose if the documents sought are 'apparently relevant' or, to use the words of Nicholas J in *ICAP* at first instance, it can be seen that the documents sought to be produced by way of subpoena will materially assist on an identified issue or there is a reasonable basis beyond speculation that it is likely the documents subpoenaed will so assist. Of course, if it can be shown that the material assistance will be to the party that issued the subpoena, the prospect of the forensic purpose of the issuing party being impugned as illegitimate will be virtually non-existent.

[66] That a subpoena need not necessarily or automatically be set aside if it cannot be shown that the material sought will not or will not be likely to assist the party issuing the subpoena is also supported by a number of intermediate appellate authorities not already referred to. Thus, in *Santos Ltd v Pipelines Authority of SA* (1996) 66 SASR 38 at 52, Debelle J, with whom Cox and Prior JJ agreed, stated that a 'party seeking to uphold the issue of a subpoena seeking documents must prove that the documents have an apparent relevance to the issues in the arbitration.' This decision was referred to by Brereton J (as his Honour then was) in *Portal Software* at [29].

[67] In *Nicholls v Michael Wilson & Partners Limited* [2010] NSWCA 100 at [34], Young JA, referring to *Waind*, observed that:

> 'In modern litigation, a person is entitled to issue a subpoena and have it answered if there is a legitimate forensic purpose in issuing the subpoena, that is, that he or she has a reasonable cause to believe the documents subpoenaed have the capacity to throw some light on the issues in the proceedings; see eg *National Employers' Mutual General Insurance Association Ltd v Waind & Hill* [1978] 1 NSWLR 372.'

Apparent relevance and fishing

[68] There is a plain difference between 'apparent relevance' and 'fishing', the latter being the metaphor that is frequently deployed in this area of discourse: see, for example, *The Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 575; (1938) 55 WN (NSW) 215. The word 'apparent' admits of the possibility that the documents sought by way of subpoena may not ultimately turn out to be relevant. Their apparent relevance, however, should be able to be ascertained by an examination of the description or identification of the document or documents sought in the schedule to the subpoena in light of the issues in the case, as they present themselves on the pleadings, in particulars and/or in affidavits or witness statements if they have been filed or served at the time of the issue of the subpoena.

[69] If the documents are apparently relevant and, provided that the terms of the subpoena are not unduly vague or the ambit of the subpoena is not such that it would be oppressive to comply with it, the subpoena should not be set aside…"

11 Ms Kumar referred to the statement of particulars filed by Ms Haragli on 24 November 2020 and to the various injuries and disabilities for which she claims damages. These include loss of feeling feminine, attractive or sexual; strained relationships with her children; restricted ability to engage with her children in activities such as bike riding, swimming and walking; restricted ability to perform household duties; significant reliance on family members for personal and domestic care; marriage breakdown; the need to have someone present at

all times due to sudden blood pressure drop, to assist in using the bathroom at night and getting out of bed, particularly in the morning; and an inability to work. The possible reference to matters such as these in the documents sought is sufficient in Ms Kumar's submission to show the existence of an apparent relevance and the existence of a legitimate forensic purpose.

12 With respect to the issue of breadth, Ms Kumar observed that the alleged delayed diagnosis occurred over a period from 2008 until the ultimate diagnosis of cancer in approximately November 2011. The alleged injuries and disabilities which flow from the delayed diagnosis commence from the time Ms Haragli underwent treatment for her breast cancer, which was in approximately mid-November 2011. The subpoena is directed to that timeframe.

13 With respect to the issue of privacy, Ms Kumar submitted that it is well known that within personal injury litigation, subpoenas are frequently issued to treating practitioners. Those practitioners can include psychiatrists and psychologists and regularly involve access to highly sensitive information which is obtained by legal practitioners. Ms Kumar contended that there was no legitimate distinction to be drawn between that information and any personal or sensitive private matters that may be contained in diaries or journals.

14 Finally, Ms Kumar noted that the issue of practicality described by Mr Stone was, in effect, a false issue. The offer by Ms Jefford to restrict the apparent width of paragraph 4 of the subpoena was made in an attempt to address some of Ms Haragli's concerns. The solicitors for Ms Haragli would not be required to expend the time or energy complained of in limiting the scope of the request if the subpoena were answered by the production in full of the documents requested.

Consideration

15 It seems to me that the documents sought by paragraph 4 of the subpoena have an apparent relevance. It does not matter that the documents may include or contain additional entries that have no relevance, or are unrelated, to the issues in the present proceedings. Written recordings by a plaintiff of matters personal to her in proceedings of this type might reasonably be expected to contain entries dealing with her physical and psychological

conditions, among other things. It would also appear that there may be a dispute between Ms Haragli and Dr Tan with respect to what passed between them at the consultations about which Ms Haragli complains. The prospect that the documents contain no reference to such material or subject matter when examined in due course does not mean that they do not at the point of issuing the subpoena have some apparent relevance.

16 Moreover, Dr Tan has pleaded in his amended defence that Ms Haragli's claim is barred by operation of s 50C of the *Limitation Act 1969* as it was commenced more than three years from the date upon which her cause of action was discoverable. No submissions were directed to this issue but it may well be that this pleading also reliably informs the existence of a legitimate forensic purpose.

17 The breadth of paragraph 4 of the subpoena is not something about which Ms Haragli can in my view legitimately complain. The diaries and journals to which Dr Tan seeks access appear more or less to correspond to the period from when Ms Haragli's diagnosis was made up until the present time. On one view, having regard to the fact that Ms Haragli first consulted Dr Tan in 2008, an argument could possibly be mounted that the period covering the documents was generously constrained.

18 Mr Stone referred, when asked by me for authority dealing with the proposition that privacy was a reliable indicator of the legitimacy of a subpoena, to a single line in the judgment of Basten JA in *Lowery v Insurance Australia Ltd* [2015] NSWCA 303 at [11]. That paragraph is in these terms:

> "[11] Decisions as to access to material produced under subpoena should be addressed by reference to two factors, which may not be adequately reflected in earlier decisions. First, the mass creation of electronic records of transactions provides new and growing sources of information about individuals with a high degree of particularity as to place and time. Relevantly for present purposes, electronic records of mobile communications fall into this category. (Records of electronic payments fall into a similar category.) *This consideration has, in its turn, spawned concern as to unjustifiable intrusions on individual privacy*. Secondly, whether a forensic purpose is legitimate or not must depend on matters of practice and procedure governing a trial. While that has always been so, the rules of evidence have changed over time. Some rules are directed against the production of documents recording

> ‘protected confidences’. There are general constraints on admission of ‘credibility evidence’. Cross-examination as to credibility is now governed by s 103 of the *Evidence Act*. Evidence in rebuttal of answers given by a witness under cross-examination is governed by the terms of s 106 of the *Evidence Act*.” (Emphasis added.)

19 With respect to Mr Stone’s proposition, this line does no more than state the problem: it does not in my opinion assist him to advance an answer.

20 At the heart of Mr Stone’s analysis is that it would be inimical to Ms Haragli’s right to privacy to require her to surrender material potentially of the most private nature which may also be unrelated to any issue in the current proceedings. The latter qualification would in the normal course exclude such material from evidence that might in due course be received in the trial. To the extent that private matters of an intimate or personal nature retained relevance to those issues, the claim that they may also be embarrassing or confidential would not appear to me, without more, to be a factor that precludes their production.

21 Mr Stone makes the point that confidential medical records that are produced in response to a subpoena are in effect voluntarily produced by a plaintiff because he or she must be taken to have consented to the possibility, if not the inevitability, that such otherwise privileged communications would ultimately be exposed to the scrutiny of the trial process. On his argument, documents such as diaries or journals of private recollections ought not to be treated in the same way, as their production is not the inevitable consequence of the commencement of proceedings and is accordingly involuntary. As attractive as that argument appears at first sight, it does not in my view withstand scrutiny. It seems to me that in a case in which a plaintiff’s contemporaneous recollections of events are or may be relevant to an issue in the proceedings, the documents are in the first instance amenable to production. It is in my view not correct that the issue of the production of medical records is to be treated differently because they are produced voluntarily. Having regard to the privilege attaching to medical confidences, they are no less private than matters recorded in a personal diary.

22 Finally, there does not appear to me to be any issue of practicality involved in the production of the documents in question. The issue of whether or not some

of the material that they might contain is relevant or admissible may in due course require a detailed examination and itemisation. That, however, is an issue for the trial, or perhaps even before that if access is sought earlier, but does not arise at the point of production.

23 In my opinion, Ms Haragli's application to set aside paragraph 4 of Dr Tan's subpoena should be dismissed. The costs of the motion should be Dr Tan's costs in the proceedings.

Further issue

24 I am reminded that Ms Haragli's experts in relation to damages are Dr Darveniza, a neurologist, Dr Dias, an occupational physician, Dr Jungfer, a psychiatrist and Ms Alcock, an occupational therapist. Dr Tan's corresponding experts are Dr Walker, a neurologist, Dr Dalton, a rehabilitation physician, Dr Brown, a psychiatrist and Ms Hammond, an occupational therapist.

25 The gravamen of the opinions of Drs Walker, Dalton and Brown is that Ms Haragli has a somatization disorder, and that there is not a formal or proper organic basis for the symptoms that she experiences. That is a view with which Dr Darveniza and Dr Dias, and to an extent Dr Jungfer, disagree. These doctors consider that Ms Haragli does have an organic basis for her complaints, or what is referred to as a motor neuropathy and fibromyalgia. This is addressed in Ms Burgan's affidavit sworn on 2 December 2021.

26 The Court set a deadline of 15 October 2021 for Ms Haragli to provide evidence in reply. In light of the evidence from Drs Walker, Dalton and Brown, her solicitor commissioned an additional opinion from Dr Champion to respond to the issue of whether her complaints are organic or psychiatric or a combination of both.

27 Ms Haragli's solicitor has deposed to the fact that there were delays in scheduling a face to face consultation with Dr Champion, rather than doing it by AVL. Ms Burgan sent an email on 15 October 2021, the expiry of the time limit, seeking an extension of time to file all Ms Haragli's evidence in reply. There was no response to that email. Dr Champion's report was served on 1 November 2021.

28 Dr Tan objects to Ms Haragli relying on Dr Champion, and significantly does not want him to participate in the conclaves. It is in these circumstances that the issue has been raised before me, rather than being left until the trial commences. If Dr Champion were to participate in a conclave, it would be with Drs Dias and Dalton.

29 Dr Tan also objects to Dr Champion on the basis that it is not evidence in reply. Dr Brown, who is relied upon by Dr Tan, prepared a report in June 2020 that was served in August of that year. Dr Brown raised the issue of the exacerbation of a pre-existing chronic pain disorder, or what is now referred to in the literature as a somatoform symptom disorder.

30 Mr Stone has identified the suite of specialists who have been engaged in these proceedings. Up until the service of Dr Champion's report, these did not include a rheumatologist. Dr Tan does not have the benefit of an expert with that specialty. Dr Tan maintains that Dr Champion's report should not be permitted.

31 Moreover, Dr Champion practises in the sub-specialty of pain management. Dr Tan maintains that, having regard to the time of the year, he cannot secure an expert opinion in that area and that he is prejudiced in the circumstances. The issue of whether Ms Haragli's condition amounts to a somatoform disorder is also already alive in the supplementary reports upon which she relies that have been served in the proceedings so far.

Determination

32 In my view, Ms Haragli should be permitted to rely upon the report of Dr Champion and he should be directed to take part in the relevant conclave. Although Dr Tan specifically, and in my view quite properly, disavows any reliance upon the fact that Dr Champion's report was served two weeks late, the perceived substantive difficulties identified by Dr Tan are more apparent than real. The issue to which Dr Champion's attention has been directed is, as Ms Kumar notes, already identified in experts' medical opinions served so far. It will presumably be an issue for the trial judge whether or not Dr Champion's opinion figures prominently among them.

33 There is, and has in my imperfect memory long been, a perception among litigators that the strength of medical experts is as much numerical as it is medical. At least during the time that I have been called upon to adjudicate it, I have never shared that view. Without meaning any disrespect, the addition of Dr Champion's opinion will not alter the issues that are likely to arise in the area of the dispute to which his expertise is directed. His opinion will be considered both by his fellow practitioners in conclave as well as by the trial judge in evidence. Its importance will be assessed by what he says, not because he says it from a pain management sub-specialty or as a member of a larger team of doctors marshalled by Ms Haragli. If some point of substance arises at the trial that is at odds with my anticipation of the true position, no doubt it will receive attentive consideration by the trial judge.

34 Ms Haragli should be permitted to rely upon the late served report of Dr Champion. Dr Champion should participate in the relevant conclave.

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