UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JILL D. DAVIS	:	
Plaintiff,	:	
	:	
v.	:	
	:	C.A. No. 14-228M
AMICA MUTUAL INSURANCE	:	
COMPANY,	:	
Defendant.	:	

MEMORANDUM AND ORDER

This breach of contract case concerns the value of the claims of Plaintiff, Dr. Jill Davis, for uninsured motorist benefits under automobile and umbrella insurance policies issued by Defendant, Amica Mutual Insurance Company. Plaintiff was injured in a serious 2011 hit-and-run accident. Because of the psychological and behavioral limitations resulting from the physical injuries caused by the accident, particularly limitations on her ability to concentrate, focus and listen critically, she alleges that she is now indefinitely and permanently disabled, not only unable to work as a psychiatrist but effectively unemployable.

Discovery in this case revealed that Plaintiff has been treating for post-traumatic-stress-disorder ("PTSD") with Massachusetts psychiatrist Dr. Sara Bolton since 2004; from 2004 to the present, she has seen Dr. Bolton weekly. As soon as it became aware of this treatment, Defendant issued a subpoena duces tecum seeking production of Dr. Bolton's records for the three year period preceding the accident and continuing to the present. It contends that these privileged therapist-patient records are highly relevant because Plaintiff has placed her mental and emotional condition in issue by claiming total disability. To support its argument, Defendant points to Plaintiff's testimony that her injuries have impacted her ability to focus, concentrate and listen critically, which has made her work as a physician impossible. While Plaintiff

maintains that her limitations were caused by undifferentiated nerve pain arising from her accident,[1] Defendant says Plaintiff's treatment with Dr. Bolton is directly probative on the issue of alternative causation.[2] See Turner v. Comm'r of Soc. Sec., 613 F.3d 1217, 1228 (9th Cir. 2010) (PTSD symptoms include difficulty concentrating); Lawler v. Astrue, No. 10-cv-3397, 2011 WL 5825781, at *2 (E.D.N.Y. Nov. 14, 2011) (diagnostic criteria for PTSD include difficulty concentrating); Nelsen v. Research Corp. of Univ. of Haw., 805 F. Supp. 837, 843 (D. Haw. 1992) (same). Therefore, Defendant contends, Dr. Bolton's records are relevant and the interests of justice require their disclosure.

Plaintiff has moved to quash (ECF No. 17); she argues that her injuries were physical and that her extremely high level of functioning (as a medical student and medical resident) prior to the accident demonstrates that she had no pre-existing mental health condition. She represents that she does not intend to call Dr. Bolton as a witness, and is willing to stipulate that she will pursue no claims of mental anguish, mental suffering or any similar condition, provided there is no discovery of her therapist-patient information. ECF No. 17 at 4, ECF No. 20 at 4. Accordingly, she contends that these mental health treatment records are irrelevant and

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[1] The parties quibble over whether the limitations are caused by undifferentiated nerve pain, as Plaintiff contends, or Complex Regional Pain Syndrome, as Defendant asserts. The distinction is not material – it is undisputed that Plaintiff has stated in her complaint, deposition, and interrogatory responses that she cannot work because of her inability to focus, concentrate and listen critically. See Compl. ¶ 19 (ECF No. 1); Pl.'s Dep. 26:16-20, 63:3-9 (ECF No. 19 at 20, 21); Pl.s' Interrog. Resp. No. 2 (ECF No. 19 at 48-49, 50, 51, 52-53).

[2] It must be noted that Dr. Bolton's records evidencing PTSD are also relevant within the meaning of Fed. R. Civ. P. 26(b)(1) for reasons other than the extent of Plaintiff's injuries from the accident. See Fed. R. Civ. P. 26(b)(1) ("[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."). Here, Plaintiff's complaint alleges Defendant breached its contract and the implied covenant of good faith and fair dealing. When asked for statements made by Defendant in support of those claims, Plaintiff asserted in her interrogatory responses that Defendant's representatives "suggested without basis that Dr. Davis's disability was somehow related to a past incident in which Dr. Davis suffered no physical injury." Pl.s' Interrog. Resp. No. 5 (ECF No. 19 at 62).

privileged. Specifically, she invokes the Massachusetts statutory privilege,[3] which allows a patient to refuse to disclose communications with a psychotherapist regarding the diagnosis and treatment of the patient's mental or emotional condition. Mass. Gen. Laws ch. 233, § 20B.

Under Massachusetts law, "[p]rivileges exist to shield the substance of those communications necessary for effective mental health treatment." Sorenson v. H&R Block, Inc., 197 F.R.D. 199, 203 (D. Mass. 2000). "[T]he interests protected by the psychotherapist-patient privilege are extensive. They include the interests of the patient in obtaining treatment for mental illness as well as society's interests in the advancement of mental health." Sabree v. United Bhd. of Carpenters, 126 F.R.D. 422, 425 (D. Mass. 1989). On the other hand, the patient-therapist privilege is not absolute; it is a qualified privilege, subject to various exceptions, including that it:

> shall not apply . . . [i]n any proceeding . . . in which the *patient introduces his mental or emotional condition as an element of his claim or defense*, and the judge or presiding officer finds that it is more important to the *interests of justice* that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

[3] There was initial confusion over what law to apply to Plaintiff's claim of privilege. In their opening briefs, the parties cited the law of New Hampshire and Rhode Island; at the hearing, Plaintiff shifted, arguing that Massachusetts law applies because it is the state where the treatment occurred. In the parties' subsequent briefing, Plaintiff stuck with Massachusetts law, while Defendant is agnostic, arguing that the result would be the same under Rhode Island, Massachusetts or New Hampshire law. Because this is a diversity case, state law governs privilege. Fed. R. Evid. 501. While the law is unsettled on which state's medical privilege applies to records arising from treatment provided outside the forum state, federal courts generally employ the conflict of laws doctrine for the forum state. Kenneth Graham, 23 Fed. Prac. & Proc. Evid. § 5435 (1st ed.); see Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (federal court applies choice of law from state in which it sits); KL Grp. v. Case, Kay & Lynch, 829 F.2d 909, 918 (9th Cir. 1987) (listing methods to resolve choice of law for privilege). Applying Rhode Island's general "interest weighing" approach to choice of law principles, Najarian v. Nat'l Amusements, Inc., 768 A.2d 1253, 1255 (R.I. 2001), I agree with Plaintiff, finding persuasive the cases that hold that the state where the treatment occurred should dictate the privilege applicable to the records. See Tartaglia v. Paul Revere Life Ins. Co., 948 F. Supp. 325, 326-27 (S.D.N.Y. 1996) (medical privilege is determined by reference to law of state in which services were rendered); see also Lego v. Stratos Lightwave, Inc., 224 F.R.D. 576, 579 n.10 (S.D.N.Y. 2004) (listing cases); cf. Mitsui & Co. (U.S.A.) Inc. v. P.R. Water Res. Auth., 79 F.R.D. 72, 79 (D.P.R. 1978) (reasoning privilege law where accountants practiced comports with expectations of parties and state's interest in confidentiality of communication). Accordingly, Massachusetts law on the psychotherapist-patient privilege controls because Dr. Bolton treated Plaintiff in Massachusetts.

Mass. Gen. Laws ch. 233, § 20B(c) (emphasis added). The party asserting this privilege (here Plaintiff) has the burden of showing its applicability. See Colonial Gas Co. v. Aetna Cas. & Sur. Co., 144 F.R.D. 600, 604 (D. Mass. 1992); Purcell v. Dist. Attorney for Suffolk Dist., 676 N.E.2d 436, 440 (Mass. 1997). However, once she satisfies the Court that privileged records are implicated, the burden of establishing that the conditions for disclosure are satisfied rests with the party who seeks access to the privileged material (here Defendant). Donovan v. Prussman, No. CIV. A. 99-175D, 2000 WL 1257463, at *7 n.5 (Mass. Super. Ct. Aug. 28, 2000) (citing Cabrera v. Cabrera, 580 A.2d 1227, 1233 (Conn. App. Ct. 1990)). Because the privileged nature of Dr. Bolton's records is undisputed, the focus must therefore be on whether Defendant has demonstrated that this exception to the privilege applies.

In construing the exception, the threshold inquiry is whether Plaintiff has placed her mental or emotional condition in issue. While Massachusetts courts routinely hold that a "garden-variety claim of emotional distress" does not make the party's mental or emotional condition an element of the claim, when a plaintiff claims to be suffering from a "psychic injury or psychiatric disorder," the litigant's mental or emotional condition is considered to have been placed in issue so that privileged treatment communications are relevant. Sabree, 126 F.R.D. at 426. Even when the injury is physical, if the sequelae are emotional, courts find that the patient's mental and emotional condition is in issue; for example, if stress, anxiety and depression are caused by a physical injury, resulting in the inability to work, mental health records related to those conditions are relevant. Martin ex rel. Martin v. Town of Upton, No. CAWO200402162, 2007 WL 809818, at *3 (Mass. Super. Ct. Feb. 2, 2007) (plaintiff makes mental or emotional condition element of claim by describing harm as depression or mood disorder); Robart v. Alamo Rent-A-Car, LLC, No. 034603J, 2005 WL 1009746, at *3 (Mass.

Super. Ct. Mar. 16, 2005) (plaintiff who alleges physical injuries and psychiatric sequelae from van accident, including difficulty focusing, impaired memory and inability to work, has made psychiatric disorder central element of claim); Donovan, 2000 WL 1257463, at *4 (although injury was physical, mental and emotional harms are central to damages; question is nature of injury and what damages resulted from it).

These cases make plain that, when a physical injury causes a mental impairment, resulting in the inability to function well enough to return to work, and the plaintiff makes it a central element of her claim, it is well settled that she has introduced her "mental or emotional condition as an element" of her claim. Donovan, 2000 WL 1257463, at *4. Accordingly, I find that Plaintiff's claim of disability has placed her mental and emotional health in issue by her allegation that she is disabled due to her inability to concentrate, focus or listen critically. Linscott v. Burns, No. 2003-00648, 2005 WL 351039, at *3 (Mass. Super. Ct. Jan. 27, 2005) (mental health in issue based on claim of disability as a result of physical injury and emotional harm it caused).

This does not end the analysis – even when a plaintiff has introduced psychic damage as an element of her claim, the records remain protected unless the court also finds that the interests of justice require that the defendant should have access. Robart, 2005 WL 1009746, at *5 (defendant failed to show that its ability to defend would be impaired without records; its need did not outweigh plaintiff's significant interest in maintaining confidentiality). Put differently, the records remain shielded unless either the patient calls the psychotherapist as a witness or introduces evidence of the communication through her own testimony, or the party seeking access makes a specific showing that the truth-seeking function of the trial will be seriously impaired unless disclosure is ordered. Linscott, 2005 WL 351039, at *3. Because Plaintiff has

clearly stated that she does not intend to call Dr. Bolton or to place her communications with Dr. Bolton in evidence, the inquiry must focus on whether this Court's truth seeking function will be distorted because Defendant and its experts are unable to understand Plaintiff's pre-accident emotional health as it affects her ability to concentrate. To pierce the privilege, Defendant must demonstrate "a good faith, specific, and reasonable basis for believing that the records" contain such information. Donovan, 2000 WL 1257463, at *7 n.4.

Massachusetts courts applying these principles consistently find that this prong is satisfied by a showing that the privileged records are plainly relevant to the defense of a civil claim voluntarily made by the patient who seeks to protect the records. For example, in Jacobs v. Vachon, 11 Mass. L. Rptr. 307, at *2 (Mass. Super. Ct. 2000), the court found that it is more important to the interests of justice that the communication be disclosed than that the relationship be protected based on the defendant's showing that the impairment to the plaintiff's mental health may have been caused by circumstances not involving the defendant. Id. at *3 (ordering mental health treatment records to be produced). Thus, the interests of justice tip in favor of production of mental health records if the party seeking production makes a threshold showing that they may reveal that the claimant's mental and emotional distress was caused by prior, unrelated events. Riley v. Gen. Emp't Enters., No. CIV.A. 04-12318-RWZ, 2006 WL 1344085, at *1 (D. Mass. May 16, 2006) (to the extent records establish plaintiff's emotional distress resulted from pre-existing conditions and not from plaintiff's allegations, defendant's access "is in the interest of justice under Massachusetts law"); Guimares v. Prete, 5 Mass. L. Rptr. 180, at *2 (Mass. Super. Ct. 1996) (ordering release of records under § 20B(c); "[i]n a civil case like this . . . plaintiff's mental and physical health is a critical issue placed in issue by the plaintiff herself,

and medical records may reveal mental and emotional distress caused by prior, unrelated events.”).

Plaintiff counters by citing to cases like Vanderbilt v. Town of Chilmark, 174 F.R.D. 225 (D. Mass. 1997), which held that the facts presented established that the interests of justice tipped against the defendant’s access to mental health evidence unless and until the plaintiff called the psychotherapist as a witness. Id. at 230 (interpreting federal common law privilege); see also Robart, 2005 WL 1009746, at *3, *5 (party seeking access failed to make a showing of need sufficient to outweigh patient’s interest in confidentiality). These cases make clear the importance of scrupulous respect for the patient’s right of confidentiality, but they do not alter the power of the court to order production based on a finding that “the truth-seeking function of the trial will be seriously impaired unless a disclosure of the communication is ordered.” Linscott, 2005 WL 351039, at *3.

Focusing on how this Court should make the “interests of justice” determination, Plaintiff urged employment of the elaborate Bishop/Fuller protocols (*in camera* review followed by in-court access) adopted for use during criminal trials to protect the victim’s mental health records. These protocols were developed in Commonwealth v. Bishop, 416 Mass. 169 (1993), and refined in Commonwealth v. Fuller, 423 Mass. 216 (1996). However, these protocols have since been abrogated by Commonwealth v. Dwyer, 448 Mass. 122, 144 (2006).[4] In any event, I decline to adopt the protocol used for criminal cases; there are too many differences, particularly the voluntary nature of the civil patient’s participation in the civil proceeding. See Robart, 2005 WL 1009746, at *4-5 (questioning propriety of criminal protocol in civil case); Federlein v. Chang, 2001 WL 171329, at *1 (Mass. Super. Ct. 2001) (same); Donovan , 2000 WL 1257463, at *5

[4] The newer Dwyer protocol actually permits defense counsel to review the records before arguing that they should be produced.

(same). I also decline to do an *in camera* inspection of these records because the determination of relevance would require medical expertise beyond my ken. Dwyer, 448 Mass. at 144 (trial judges examining records are all too often unable to recognize the significance, or insignificance, of mental health treatment documents to defense of case); Linscott, 2005 WL 351039, at *3 n.4 (nothing in Mass. Gen. Laws ch. 233, § 20B(c) suggests court should conduct *in camera* review). Nevertheless, these cases make clear that, even after the court finds that the plaintiff has placed her mental or emotional condition in issue and that the interests of justice require production, it must remain vigilant to fashion an order that is protective of the patient's interest in confidentiality enshrined in Mass. Gen. Laws ch. 233, § 20B.

Applying these principles here, I find that justice requires that Defendant get access to the records that are proximate to Plaintiff's injury. Defendant has made a strong showing of need for these records – Plaintiff claims that her physical injury caused the inability to concentrate and focus to such an extent that she is unable to work at the same time that, during the period immediately prior to the accident, she was treating weekly with a psychiatrist for a mental health condition (PTSD) that affects the ability to concentrate. See Doe v. Roman Catholic Bishop of Worcester, No. 20042511C, 2006 WL 620701, at *2 (Mass. Super. Ct. Feb. 2, 2006) (mental health treatment directly related to claim and defense of claim, "[a]s a result, . . . defendant should have the opportunity to inquire into the plaintiff's treatment . . . [to show] the impairment to the plaintiff's mental health and other damages may have been caused by circumstances not involving the defendant").

Nevertheless, Plaintiff's interest also remains strong, particularly in the confidentiality of Dr. Bolton's therapy notes. See Booker v. City of Boston, No. 97-CV-12534-MEL, 1999 WL 734644, at *1 (D. Mass. Sept. 10, 1999) (distinguishing between diagnostic testing and patient

communications); P.W. v. M.S., 857 N.E.2d 38, 44 (Mass. App. Ct. 2006) (same). Accordingly, I order that Defendant shall be provided with copies of Dr. Bolton's diagnostic records (records reflecting diagnoses, objective testing and observation and mental status examinations) for the period beginning three years before the accident to the present; in addition, Defendant shall be provided with copies of Dr. Bolton's treatment notes (therapy or counseling notes) for the period beginning one year before the accident and ending one year following the accident. I further order that the produced records shall be treated as strictly confidential, with access limited to Defendant's attorneys and experts and use limited to this litigation. To ensure that the use limitation is enforced, I order that the records shall be maintained by Defendant's attorneys and/or experts in space (whether physical or electronic) to which access even within the law firm is limited to those with the need to review them for the purpose of this litigation. Finally, I note that this order is based on the showing of need that Defendant has made at this threshold stage. To the extent that Defendant is able to establish, based on the interests of justice, that it needs additional mental health records for more remote periods, this order is without prejudice to its ability to seek them.

For the foregoing reasons, Plaintiff's Motion to Quash Subpoena Served to Sara Bolton, M.D. (ECF No. 17) is granted in part and denied in part.

So ordered.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
February 3, 2015