

CANADA / JUDGMENT

Brown v. Fisher

2023 BCSC 2070

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2070 Brown v. Fisher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Fisher,

2023 BCSC 2070

Date: 20231124

Docket: M207216

Registry: Vancouver

Between:

Jeanette Brown

Claimant

And

Dylan Fisher

Defendant

Before: The Honourable Master Robertson

Reasons for Judgment

Counsel for the plaintiff:

D. Kolb

Counsel for the defendant

M. Caine

Place and Date of Hearing:

Vancouver, B.C.

September 15, 2023

Place and Date of Judgment:

Vancouver, B.C.

November 24, 2023

- [1] The defendant brings this application for an order to declare certain questions as were objected to by the plaintiff's counsel at her examination for discovery to be valid, and compel the plaintiff to attend a further examination for discovery in order to answer those questions.

Background

- [2] By way of brief background, the plaintiff alleges that she was injured in a motor vehicle accident on July 14, 2018 (the "Accident") when the vehicle she was driving, when at a stop, was struck from the rear by the defendant's vehicle. She alleges that, among other injuries and loss, she suffered injuries to her head, neck, shoulder, back and legs resulting in a concussion, cognitive and neurological symptomology, and headaches.
- [3] In its filed response, the defendant has denied liability for the Accident and plead that if any injury did occur, it was due to a pre-existing and/or subsequent injury or condition.
- [4] At an examination for discovery held August 30, 2022 (the "Discovery"), which lasted 2 hours and 6 minutes before being adjourned, the defendant's counsel asked the following questions of the plaintiff, which were objected to:
101. To the best of your knowledge, is that correct that you never had any symptoms or received treatments to the arears that were injured in this action?
233. In the 10 years before the accident had you been involved in any other motor vehicle accidents?

(the "Outstanding Questions")

- [5] Specifically, counsel for the plaintiff objected to the time frame for the question as to pre-existing conditions or prior accidents, allowing them to be answered only in respect of a prior two-year period.
- [6] At the Discovery, the plaintiff deposed that she had no complaints regarding her neck, right shoulder and lower back in the two years prior to the Accident.

- [7] Prior to the Discovery, the plaintiff had provided the defendant with various clinical records for the period three years prior to the Accident forward, including from her general practitioner, Surrey Memorial Hospital, Royal Columbian Hospital and physiotherapists, as well as a Medical Services Plan ("MSP") printout.
- [8] The pre-accident records indicated that:
- a) On November 15, 2017 the plaintiff mentioned that she had numbness and tingling which started in her head and spread to her body; and
 - b) on September 14, 2017, the plaintiff's general practitioner recorded that she had reported soft tissue pain in her neck and lower back.
- [9] In addition, a court services online search showed that a claim had been filed by an individual with the plaintiff's maiden name in respect of motor vehicle accidents on July 7, 2004 (approximately 14 years prior to the Accident) and November 10, 2009 (approximately 9 years prior to the Accident).
- [10] Trial is set for 6 days commencing May 13, 2024.

Legal Analysis

- [11] The parties did not disagree as to the applicable law on applications such as this, where the court seeks to apply discoverability rules in a way that is proportionate, and balances privacy concerns.
- [12] The application is governed by R. 7-2(18)(a) and (25), which read as follows:
- (18) Unless the court otherwise orders, a person being examined for discovery
- (a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action,
- (25) If a person under examination objects to answering a question put to him or her, the question and the objection must be taken down by the official reporter and the court may:
- (a) decide the validity of the objection, and
 - (b) order the person to submit to further examination and set a maximum duration for that further examination.
- [13] In general, the pleadings define the scope of discovery: *Cominco v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142, at paras. 8 and 9

- [14] A broad or wide scope is to be given on examinations for discovery, given that they are in the nature of a cross examination, such that parties ought not interfere with the examination except where it is clearly necessary to resolve ambiguity or prevent an injustice. Such a "hands off" approach accords with the principle of proportionality: *Kendall v. Sun Life Assurance Co. of Canada*, 2010 BCSC 1556 ("Kendall"), at para. 10 - 12 and para. 18, and *Nwachukwu v. Ferreira*, 2011 BCSC 1755, at para. 33.
- [15] As noted in *Kendall*:
- [14] The newly imposed time limit on discovery makes it all the more important that the courts enforce the principle that counsel for the examined party must not unduly interfere or intervene during the examination for discovery. The time limit imposes a self-policing incentive on the examining counsel to be focused and to not waste time on questions that will not advance the purpose of investigating the case or obtaining admissions for use at trial.
- [16] In this respect, the scope is broader than that of document discovery: *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166, at paras. 6 to 9.
- [17] However, there are limits to the discovery rights. In this respect, a party is not expected to, as has often been said, "throw open their file cabinets" to allow unlimited inquiries into their private affairs, including their medical history.
- [18] The defendant relies on the following decisions:
- a) *Hickey v. Roman Catholic Archdiocese of Vancouver*, 2015 BCSC 2314, where the court found that questions regarding a motor vehicle accident 10 years prior to the subject accident, and whether any compensation was received, was not objectionable; and
 - b) *Andrist v. Bryant*, 2023 BCSC 490 at para. 35, where the court agreed that a blanket objection to questions about the plaintiff's medical history beyond two years prior to the subject accident was unreasonable. However, I note that the court specifically referenced the plaintiff's medical history, which included evidence of back and neck issues prior to the subject accident, and a traumatic brain injury in both 2001 and 2018 (the subject accident was in December 2018).
- [19] The plaintiff argues that by allowing the defendant to ask inquiries limited to the two-year pre-Accident time frame, and providing clinical records for that same period, the defendant has been able to adequately canvas the medical issues that were reported in 2017. In the plaintiff's position, the records, including the MSP printout, has not revealed any treatment other than those brief entries to support any inquiry going further back than 2016, as has been agreed to. As such, allowing questions regarding incidents that occurred 9 or 14 years prior to the Accident are nothing more than fishing expeditions which are not only inappropriate, but fail to strike an appropriate balance of the plaintiff's privacy considerations and the right to discovery.

- [20] The plaintiff relies on the following statements made in *Marchant-Larson v. Bahrami*, 2017 BCSC 2337, in support of a general two-year rule:
- (7) The defendants bring no specific evidence in support of their application that more than two years of records are required. They simply point to the pre-existing conditions, the evidence that these pre-existing conditions are of some considerable length and history prior to the accident, and certainly well prior to two years before the accident. There is no evidence from any expert that more than two years of disclosure are required in order to properly analyse her propensity for having the problems she is currently experiencing or to establish the baseline for an analysis of her present condition.
- (8) There is nothing before me that takes this outside of the sort of general concept that two years prior to a motor vehicle accident is a sufficient investigation, barring other evidence, to allow the defendants to properly investigate the facts surrounding pre-existing conditions.
- [21] Further, in *Fallahpour-Sichani v. Harapnuik*, 2019 BCSC 2046, the court found it unreasonable to allow questioning about the time frame that was a decade prior to the accident, despite there being some connection to pre-existing issues being shown in the medical records, noting as follows at para. 26:

The defendants in this case have put the plaintiff's pre-accident health in issue. They have demonstrated a connection between the plaintiff's pre-accident pain, anxiety and depression, and her damages claim. However, I agree with the plaintiff that eight or nine, and in some categories, almost 12, years of production fails the proportionality analysis.

[22] The same can be said in this case.

- [23] As further noted at para. 27, the issue is not whether the plaintiff had, in that case, back pain in 2007, but whether the plaintiff had pre-existing pain when the subject accident occurred in 2015. The defendant argued that the pre-existing condition is, in that respect, necessary in order to develop a baseline to the plaintiff's condition pre-accident.
- [24] I agree with the defendant that there is no hard and fast rule that there is a 2-year limit on discovery questioning, rather each case must be determined on the facts before the court.
- [25] However, in this case, there is no evidence to support that incidents which occurred 9 and 14 years prior to the Accident lead to any ongoing symptomology, at least in the 3 years prior to the Accident as those records have been disclosed.
- [26] In submissions, the plaintiff noted that "no one plans on getting into an accident. If a person has ongoing symptoms, you would see it somewhere in the records". Here, there are only two references in the year prior to the Accident, with nothing in the two years prior to that.

- [27] In other words, there is no evidence to establish that in order to discover the plaintiff on whether or not she suffered from pre-existing conditions, or as to what her base line was when the Accident occurred, that it is necessary to question her about matters longer than two years prior to the Accident.
- [28] To the extent there were complaints approximately one year prior to the Accident which may have some similarity to the injuries alleged to have been suffered in the Accident, there is no evidence of any ongoing treatment to justify opening up the discovery for inquiry going back for a 10-year period. That would not be proportionate, and would be an unreasonable infringement of the plaintiff's privacy.
- [29] While there may be overlap in compensation in an award or settlement that, for example, may be in respect of loss of future capacity or future wage loss based on an expectation of disability going passed 2018, questions can be asked that are specific to that issue, in way that strikes the balance of proportionality.
- [30] However, the broad question as to whether or not there has been any motor vehicle accident for the 10-year prior period, without medical evidence to support ongoing symptoms in the 3 years prior to this accident other than what is a limited reference to general symptomology, is too remote and invasive.

Disposition

- [31] As such, I dismiss the application, with costs to the plaintiff in the cause.

"Master Robertson"

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