

CANADA / JUDGMENT

## Brown v. Steffler

2022 BCSC 2214

### COURT

Supreme Court of British Columbia

### DECIDED

7 December 2022

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2022 BCSC 2214 Brown v. Steffler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Steffler,

2022 BCSC 2214

Date: 20221207

Docket: M-199970

Registry: Vancouver

Between:

Jeremy Erich Cantner Brown

Plaintiff

And

Lori Rose Steffler

Defendant

Before: The Honourable Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Shakibakho, Articled Student

Counsel for the Defendant:

K. Wrolson, Articled Student

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 7, 2022

Place and Date of Judgment:

Vancouver, B.C.

### **December 7, 2022**

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] On this application, the defendant seeks production of clinical records from a treating physician from 2009 relating to a prior knee injury that he sustained.

### **Background**

- [3] By way of background, the plaintiff was involved in a motor vehicle accident on November 15, 2017, involving a motorcycle that he was riding. Liability has been denied. In the notice of civil claim he specifically claims injuries to his right knee as a result of the accident. Trial is scheduled to commence on February 21, 2023; thus, the deadline for expert reports has passed. However, the deadline for rebuttal reports has not.
- [4] The plaintiff suffered a prior right knee injury in 2009, namely, an ACL tear while playing soccer, which required surgery (the "2009 Injury"). He has reported to medical practitioners, as well as the defendant's IME physiatrist, Dr. Hosseini, that the surgery resolved his issues and that there were no residual symptoms leading up to the subject accident. The clinical records confirm that there were no reports of right knee pain or at least no treatment being sought for that in the two-year period prior to the accident.
- [5] In his medical report dated October 17, 2022, Dr. Hosseini writes as follows:
3. Please address the effect the Accident had on any medically relevant pre-existing issues, if any.

Mr. Brown had a previous ACL repair in 2009. He reported complete resolution of his symptoms prior to the accident. Definitely, this was aggravated after the subject motor vehicle accident, causing him to require a second arthroscopic surgery. The pre-existing condition makes him more vulnerable to any direct trauma to the Knee, and future possibility of osteoarthritis after multiple surgical interventions.

4. Your recommendations as to further medical treatments and procedures which may be required with respect to Mr. Brown's injuries.

At this juncture, I do not believe that further medical treatment is required as I did not identify any positive clinical findings beyond subjective reports of pain. However, consideration of ongoing strengthening exercises would be reasonable. He may require further investigations such as an x-ray or MRI of the right knee in the future as a comparison study.

[6] Further, under the heading, "Clinical Summary and Discussion", he writes:

Due to the subject motor vehicle accident, Mr. Brown underwent a revision of the right ACL reconstruction with achilles tendon allograft which was completed by Dr. Dean Malish on September 26, 2018.

Based on a thorough review of the enclosed documentation, along with the results of the current clinical assessment, it is this assessor's opinion, from a strictly musculoskeletal perspective, that Mr. Brown's clinical presentation is most consistent with the following:

- Right knee ligament joint sprain/strain, status post revision of right ACL reconstruction with Achilles tendon allograft.

I did not identify any physical restrictions or limitations with respect to Mr. Brown's accident related injuries and his ability to participate in his activities of daily living, instrumental activities of daily living, social activities, or work related activities as an animator. I do not believe that he will have any significant amount of time off in the future due to these injuries. His prognosis at this point in time is guarded given that he has likely reached maximum medical recovery. I would suggest that Mr. Brown continue a self-directed, independent, stretching and strengthening exercise program as his main treatment strategy. From a musculoskeletal perspective, I do not believe that he requires any further treatment at this time. He may require undergoing advanced imaging of the right knee in the future in order to compare to previous studies.

[7] The plaintiff's own expert, Dr. McConkey, who provided a report dated September 12, 2022, opined as follows in his report:

Overall, my prognosis is for his knee to have some ongoing dysfunction. I believe secondary to this motor vehicle accident he did have a setback in the function of his knee. I believe that the stability of his knee was worsened and required him to undergo ACL reconstruction which was a revision. It appears as though his knee also became more symptomatic in terms of discomfort. This could be secondary to the fact that he required another operation or it could be in combination with the impact that the knee took with the acute inflammatory episode causing some cartilage damage. Overall, I believe his knee will have occasional aches and pains including a possible low-grade discomfort on a daily basis. I believe that his knee will have some lesser stability to it going forward than it had prior to the motor vehicle accident. He will likely have more significant flares of pain episodically where the knee may swell and become acutely painful and dysfunctional for a week or two.

The knee will also likely develop further osteoarthritic features over the next decade to two decades. Osteoarthritis is a consequence of ACL tears and especially ACL tears associated with subtotal meniscectomies. The outcome of his knee was determined in part due to the original ACL tear in the late 2000's. However, a re-tear with another trauma, requiring another surgery would likely accelerate the degenerative change in his knee, by how many years I cannot say. I do not believe he will be required to miss any substantial amount of work given his job unless he requires further intervention.

## Analysis

- [8] The plaintiff opposes production of the clinical records relating to the 2009 Injury on the basis that there is, he argues, no evidence that there was symptomology in the two years prior to the motor vehicle accident and no evidence from any expert that the information is necessary in order for them to form an opinion on any of the issues in dispute in this litigation.
- [9] The plaintiff relies on various decisions where the court has noted that evidence is required on an application such as this to establish that it is necessary to produce records prior to the usual two-year pre-accident timeframe.
- [10] In *Stewner v. Sawires*, 2022 BCSC 1495, I recently provided a summary of the case law concerning the relevant factors for a production of records in respect of a timeframe going farther back than that usual two-year period, including the comments of the court in *Bains v. Hookstra*, 2012 BCSC 1707, at para. 14:
- [14] The applicant must demonstrate a connection between the documents sought and the issues beyond a "mere possibility": *Przybysz v. Crowe*, 2011 BCSC 731 at para. 45, referencing *Gorse v. Straker*, 2010 BCSC 119 at para. 53, and, as was noted by Master Bouck in *Edwards v. Ganzer*, 2012 BCSC 138, at para. 51, "there must be some 'air of reality' between the documents and the issues in the action ...."
- [11] Further, in *Marchant-Larson v. Bahrami*, 2017 BCSC 2337, the court noted as follows at para. 7:
- [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 analyze her propensity for having the problems she is currently experiencing or to establish a baseline for an analysis of her present condition.
- [12] The plaintiff argues that the same factors are in consideration on this application.

- [13] In addition, the plaintiff argues that those comments, along with the references in various other decisions as to expert evidence being used to establish the necessity of the historical documents (see for example: *Shannon v. Cook*, 2019 BCSC 1975, at para. 8, *Ark v. Antonias*, 2020 BCSC 1419, at para. 6, and *Stewner*, at para. 33), suggest that expert evidence is required in order for the court to make an order for disclosure going back further than the usual two-year period.
- [14] I do not agree that any of the cases stand for that proposition. While it is certainly of assistance to the court to have that level of evidence, it is not a necessity.
- [15] Rather, the consideration is whether the evidence is sufficient to establish that the previous injury to which the record sought pertained is connected to the subject injury beyond a mere possibility. Here, the plaintiff argues that it does not, saying that the pre-accident health is not relevant as there was no symptomology in the previous two years, relying on the following comments in *Fallahpour-Sichani v. Harapnuik*, 2019 BCSC 2046:
- [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.
- [27] The defendants seek documents dating back to 2007 because that is a year in which the plaintiff injured her back at work. However, the issue in this case is not whether the plaintiff had back pain in 2007, but rather whether she had pre-existing back pain in 2015. The defendants have not given a compelling reason for why they require eight or nine years of continuous medical records to investigate the plaintiff's pre-accident back condition. With knowledge of the back injuries in 2007 and 2008, three years of medical records prior to the accident are sufficient in my view to investigate whether those injuries continued to affect the plaintiff on the date of the accident.
- [16] However, in the case at bar *Dr. Hosseini* has specifically stated that, insofar as the prior injury is concerned, "definitely this was aggravated after the subject motor vehicle" and that the 2009 Injury makes him "more vulnerable to any direct trauma and future possibility of osteoarthritis after multiple surgical interventions".
- [17] Those comments establish that there is a connection between the 2009 Injury and the plaintiff's prognosis and future impairment to establish a connection beyond a mere possibility, such as the extent to which future risk of osteoarthritis may be a result from the 2009 Injury as opposed to the subject accident. This may be the basis for a rebuttal report by the defendant, given that the plaintiff's expert, Dr. McConkey, acknowledges that the risk of osteoarthritis is determined in part to the original ACL tear and that the accident accelerated his degenerative changes, but specifically notes that he cannot determine the degree.

[18] The connection that must be established is not only related to whether the injury is symptomatic, but whether it has an effect on any of the issues in dispute, such as damages. In this case, I find that connection, and, as such, I grant the order as sought by the defendant.

[SUBMISSIONS ON COSTS]

[19] THE COURT: Thank you. In terms of costs, counsel for the plaintiff argues that they have been compliant throughout these proceedings with document requests and have taken an issue on this based on the evidence -- or the case law as I have cited above and that that was a reasonable position to take.

[20] Costs are generally awarded to the successful party. In this case the defendant was successful. There is nothing to suggest that the usual rule should be departed with.

[21] Costs are to the defendant in any event of the cause but not payable until the final resolution of the action itself.

"Master Robertson"

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Prepared on 26 October 2026 · Esheria