
CANADA / JUDGMENT

Harper v. Sheppard

2023 BCSC 443

COURT

Supreme Court of British Columbia

DECIDED

23 March 2023

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2023 BCSC 443 Harper v. Sheppard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harper v. Sheppard,

2023 BCSC 443

Date: 20230323

Docket: M196265

Registry: Vancouver

Between:

Carolyn Harper

Plaintiff

And

Patricia Ann Sheppard

and Alan Sheppard

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 20 and 21 on April 6, 2023.

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiff:

M. Burtini

Counsel for the Defendants:

B. McFadden

Place and Date of Hearing:

Vancouver, B.C.

February 24, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 23, 2023

Introduction

- [1] This action arises out of a motor vehicle accident which occurred on September 29, 2017 (the "Accident"). The defendants deny liability.
- [2] The defendants apply for:
- a) Production of the complete file of the plaintiff's former General Practitioner, Dr. Kevin McKechnie, for the period January 1, 2008 to present. This is roughly ten years of pre-Accident records; and
 - b) An order that the plaintiff provide an authorization for release of:
 - i. Her "Persons with Persistent Multiple Barriers" ("PPMB") records from January 1, 2009 to present - roughly thirteen years of pre-Accident records; and
 - ii. Her Ministry of Social Development and Poverty Reduction ("MSDPR") file (including GAIN, Health Assistance Branch and Employment Skills/Training records) from January 1, 2014 to present - roughly four years of pre-Accident records.
- [3] The issue driving the request for a longer than "normal" range of pre-Accident records is because the plaintiff suffered from a serious lung infection starting in 2008 and was not able to work for several years. During this period, she received PPMB benefits. She resumed working and the benefits ended about two years prior to the Accident.
- [4] The plaintiff consents to production of Dr. McKechnie's file from January 1, 2014 to present (roughly three years of pre-Accident records) and to authorize the release of PPMB and MSDPR records from September 29, 2015 to present (roughly two years of pre-Accident records). Counsel says the defendants have not established a basis for production of any earlier pre-Accident records.

Background

- [5] The Accident occurred on September 29, 2017 in Castlegar, BC. The plaintiff alleges she suffered injuries to her head (including abrasions to her face), neck, shoulders (including rotator cuff strain), right arm, left hand, back, left leg, left knee, left ankle, headaches, dizziness, light sensitivity, fatigue and chronic pain. She claims for pain and suffering, loss of enjoyment of life, permanent physical disability, loss of physical, mental and emotional health, loss of earnings, past and prospective and special damages.
- [6] On August 3, 2022, the plaintiff was examined for discovery and testified that:
- a) She had a severe lung infection starting in 2008 which lasted for about six years. Symptoms included difficulty breathing, chest pain and flu-like symptoms. She says her physicians never figured out what caused this.
 - b) In 2009, she attempted to return to work twice, once at the Kaslow Hotel and the second time at the Kaslow Motel, but was unable to do the job.
 - c) In 2009, she began receiving PPMB benefits.
 - d) Her general practitioner between 2008 and 2011 was Dr. McKechnie. Thereafter, she began seeing Dr. Link.
 - e) In 2015, she returned to work and her PPMB benefits stopped.
 - f) By 2016, her lung issues had improved but were not completely gone. They did not impact her ability to work. She still had a bit of a lung weakness, felt out of breath and that she was exerting physically, but she was not receiving any treatment for that. When she returned to work she was getting stronger.
 - g) At the time of the examination for discovery, her lung symptoms had improved relative to 2016, but were still not gone. They were not impacting her ability to work. She described her lung symptoms as feeling slightly weak but still able to exert physically, including running or hiking.
 - h) Since the Accident she had not physically exerted to the point of pre-Accident. She described her lung symptoms generally as feeling the same as they did before the Accident, but she had not exerted herself to the point of testing whether there had been an improvement.
- [7] The trial of this action is scheduled for June 3, 2023 for 10 days. The defendants have filed a notice requiring trial by jury.

Defendants' Position

- [8] The defendants say the documents sought will either directly or indirectly enable them to advance their case, damage the plaintiff's case or may fairly lead to a train of inquiry. They have a real connection with the issues in this action, beyond a mere possibility. The documents sought are relevant to assessment of damages.

Plaintiff's Position

- [9] Plaintiff's counsel says her post-Accident medical records do not mention lung complaints. Available medical records for the period January 1, 2014 to July 13, 2022 contain only one reference to a lung-related issue, dated March 29, 2017 in her Medical Services Plan printout.
- [10] Plaintiff's counsel tendered a November 29, 2022 document entitled Work Absence Certificate prepared by Dr. Link. It states the plaintiff was unable to work due to illness/injury from December 5, 2022 to February 5, 2023 due to symptoms of chronic neck, low back and shoulder pain, headache and loss of neck mobility arising from the Accident, as well as vertigo which began some time later. There is no mention of any lung-related complaints playing a role in her post-Accident disability.
- [11] Counsel also points to the plaintiff's evidence on discovery, in which she says she was able to return to work without difficulties in 2015, she was not taking medications or receiving treatment, her lung issues had improved by 2017 and were not impacting her ability to work at all. She received no social assistance payments from 2016 to 2021. Her Canada Pension Plan records indicate her T4 earnings had returned to pre-2012 patterns two years prior to the Accident.
- [12] Counsel argues the defendants have failed to establish the additional pre-Accident records have any relevance to the matters in issue.

Applicable Law

- [13] The applications are made pursuant to R. 7-1 of the Supreme Court Civil Rules. With respect to Dr. McKechnie's records, I presume sub-rule (18) is relied on:

Documents not in possession of party

- (18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:
- (a) production, inspection and copying of the document;
 - (b) preparation of a certified copy that may be used instead of the original.

- [14] In *Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673 at paras. 78-81, Justice G.C. Weatherill set out the proper approach to interpreting sub-rule (18):
- [78] Although Davies J. concluded at para. 53 that Rule 7-1(18) should be "substantively and procedurally interpreted and applied in a way that is consistent with the interpretation and application of Rules 7-1(10) to (14)", he also concluded that, with respect to Rule 7-1(18), there should be "necessary modification to ensure protection of the independent interests of third parties whose records are sought".
- [79] That "necessary modification" includes a requirement that the applicant provide some evidence to support an application for documents from a non-party (see *Kaladjian*, para. 62) in order to prevent against "unwarranted "fishing expeditions" based solely upon pro forma pleadings" (see *Kaladjian*, para. 64).
- [80] The phrase "fishing expedition" perfectly describes the plaintiffs' application in this case. Although Ms. Tegart deposed that she has spoken to various of her constituents about the project, other than the specific documents that have been identified, there is no evidence that the requested documents even exist, let alone are in the possession or control of the appellants. With respect to those unidentified documents, in my view, the application is based upon the Peruvian Guano "train of inquiry" test that is no longer applicable under Rule 7-1(1).
- [81] It is apparent from the wording of Rule 7-1(18) that it was not intended to provide broad discovery of documents from non-parties, but rather a mechanism by which parties can access specific documents or classes of documents when it has been demonstrated that they are in the possession or control of a non-party and are relevant to an action.

[Emphasis in original.]

- [15] In *Kaladjian v. Jose*, 2012 BCSC 357 at paras. 62-65, Justice Davies addressed the requirement for evidentiary support for an application for additional documents under R. 7-1(11) and (18):
- [62] I have also concluded that the narrowing of the discovery obligations of parties and most particularly the removal of the Peruvian Guano "train of inquiry" test of relevance will generally require a defendant to provide some evidence to support an application for additional documents, whether demand is made under Rule 7-1(11) or Rule 7-1(18).
- [63] A requirement for evidentiary support recognizes the difference between the scope of examination for discovery and the scope of document discovery under the present Rules and will allow considerations of proportionality to be addressed in specific cases.
- [64] A requirement for evidentiary support in requests for additional documents and third party records also prevents against unwarranted "fishing expeditions" based solely upon pro forma pleadings.

- [65] Decisions to the contrary under the former Rule 26(11) based upon a Peruvian Guano analysis and test of relevance may offer some assistance in the assessment of relevance for disclosure purposes under Rule 7-1(18), but they must now be read in accordance with all of the provisions of Rule 7-1, including Rule 7-1(14) and the objective of proportionality.
- [16] In *Holmberg v. McMullen*, 2019 BCSC 1434, Justice Johnston found there is no automatic right to demand pre-accident records based on a bare plea of pre-existing injury. At para. 31:
- [31] I conclude that in order to succeed on an application for further document discovery under Rule 7-1(11), an applicant must provide some evidence to support a connection between the documents sought and the matters in issue between the parties. Pleadings alone are not sufficient.
- [17] This applies equally to applications under R. 7-1(18). Other cases have described the standard as requiring the applicant to demonstrate a connection between the documents sought and the issues beyond a "mere possibility": see *Addison v. Whitefox Technologies Ltd.*, 2014 BCSC 633 at para. 68; *Przybysz v. Crowe*, 2011 BCSC 731 at para. 45; and *Gorse v. Straker*, 2010 BCSC 119 at para. 53. It was described as an "air of reality" between the documents and the issues in the action in *Edwards v. Ganzer*, 2012 BCSC 138 at para. 51.
- [18] In *Marchant-Larson v. Bahrami*, 2017 BCSC 2337 at paras. 7-8, Master Muir noted that two years of pre-accident records are often sufficient to establish a pre-accident baseline for a pre-existing condition. If a party seeks more there must be an evidentiary basis for this:
- [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.
- [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.
- [19] In *Fallahpour-Sichani v. Harapnuik*, 2019 BCSC 2046 at paras. 26-27, Master Elwood, as he then was, noted that when deciding how far back to order records relating to a pre-existing condition, it is not necessarily a matter of when the injury occurred but rather whether the plaintiff had the pre-existing injury at the time of the relevant accident:

- [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.

Analysis

- [20] The plaintiff consents to production of roughly three years of pre-Accident records from Dr. McKechnie and to authorize the release of roughly two years of pre-Accident PPMB and MSDPR records. At issue is whether the defendants have established a basis for pre-Accident records back to 2008.
- [21] While there is undisputed evidence that the plaintiff was suffering with a serious lung illness in 2008 which she says left her unable to work for roughly a six-year period, she was able to return to work by 2015. She acknowledges having some residual lung issues which persisted up to the date of the Accident, but those symptoms did not interfere with her ability to work.
- [22] There is no evidence that any residual lung issues the plaintiff had as of September 29, 2017 were aggravated by the Accident, that they interacted negatively with injuries she suffered in the Accident, or that they played or are playing any role whatsoever in her post-Accident disability. Defendants' counsel did not direct me to any medical report or record which mentions lung issues as a post-Accident concern. As such, there is no evidentiary basis which justifies production of older pre-Accident records of Dr. McKechnie.
- [23] The defendants have also not provided a persuasive explanation for how older pre-Accident PPMB and MSDPR records could possibly be relevant or connected to issues in dispute this action.

Conclusion

- [24] The defendants' applications are granted to the extent that the plaintiff has consented, namely:
- a) Production of Dr. McKechnie's file from January 1, 2014 to present; and

b) The plaintiff will provide the defendants an authorization for release of her PPMB and MSDPR records from September 29, 2015 to present.

[25] The balance of the relief sought by the defendants is dismissed.

[26] The plaintiff is entitled to costs of the applications from the defendants.

"Master Bilawich"

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