
CANADA / JUDGMENT

Shilton v. Fassnacht

2006 BCSC 431

COURT

Supreme Court of British Columbia

DECIDED

13 January 2006

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2006 BCSC 431 Shilton v. Fassnacht

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shilton v. Fassnacht,

2006 BCSC 431

Date: 20060113

Docket: M030471

Registry: Vancouver

Between:

Michael Douglas Shilton and

Nichola Christie Shilton

Plaintiffs

And:

Detleff Anton Fassnacht and

Ocean Park Ford Sales Ltd.

Defendants

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

In Chambers

January 13, 2006

Counsel for Plaintiffs

I.R. Sisett

D. May

Counsel for D. Fassnacht

S. Davies

Counsel for Ocean Park Ford

R. Fister

Place of Trial/Hearing:

Vancouver, B.C.

- [1] THE COURT: This action relates to a motor vehicle accident that occurred on April 7, 2002. The plaintiffs were occupants in a vehicle that allegedly was struck by a vehicle driven negligently by the defendant Fassnacht.
- [2] In their statement of claim filed January 23, 2003, both plaintiffs claim that they suffered head injuries. Some of the medical evidence provided in support of the plaintiffs' claims raises the possibility that either one or both of them may have sustained a traumatic brain injury as a result of the accident.
- [3] The trial is scheduled to commence May 1, 2006 for 25 days. Both plaintiffs have attended examinations for discovery. A number of issues have arisen regarding pre-trial discovery, and they are the subject of the application now before me.
- [4] The defendant Fassnacht set out the issues in his notice of motion dated January 10, 2006. Several of those issues have now been resolved by consent. The two remaining contentious issues are these. First, the defendant wants disclosure of the names, addresses and telephone numbers of certain persons whom the plaintiffs referred to in their examinations for discovery, as they may be in a position to give evidence of their observations of the plaintiffs' level of mental and psychological functioning after the motor vehicle accident. Second, the defendant requests the plaintiffs' bank and credit card records.
- [5] The plaintiffs oppose both requests on the basis that the information is not relevant and that disclosure would be difficult or inconvenient and would violate rights of privacy and privilege.
- [6] I will deal first with the request for the names and contact information regarding certain potential witnesses.

- [7] At Nichola Shilton's examination for discovery on October 28, 2003, she indicated that after the accident she and her husband began leading a Bible study group, for young married couples. She said there were approximately 14 to 20 people in the group some of whose names she could recall. She said that she and her husband had to stop the group because of memory problems, and some of the group's participants had remarked about how they felt neglected by the Shiltons.
- [8] In Michael Shilton's examination for discovery on December 18, 2003, he said that at some time after the accident he experienced episodes of forgetting where he was and how he got there. He gave an example of one such occasion when he had previously been at the family home of two young boys to whom he had been acting as a big brother. Counsel for the defendant asked for the names of the parents of these children, and Mr. Shilton was able to provide only their first names Eldon and Shirley. Finally, at his examination for discovery on September 8, 2005, Michael Shilton identified a friend of his, Dave Brace, who had helped him move from his residence to his parents' residence after the accident. Mr. Shilton identified Mr. Brace as being a friend whom he continued to maintain contact with. He could not provide Mr. Brace's telephone number at the time of the discovery. He also identified several women who have attended at their residence to provide household and child care assistance after the accident. He was asked to provide their telephone numbers.
- [9] Despite repeated requests from the defendant Fassnacht, the plaintiffs have refused to produce the contact information for the persons identified by them in their examinations for discovery as set out above.
- [10] Let me say at the outset that I am satisfied that the defendant Fassnacht has established that this information is potentially relevant to his defence on the issue of damages. The potential relevance is clear from reading the portions of the examination for discovery where the plaintiffs refer to these individuals.
- [11] The defendant Fassnacht submits that he is entitled to the information about the names and contact information relating to these individuals pursuant to Rule 27(22) of the Rules of Court, which provides:
- 27(22) Unless the court otherwise orders, a person being examined for discovery shall 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, and is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.
- [12] The plaintiffs object to disclosure on a number of bases. First, they submit that the opening words of Rule 27(22) give the court a discretion to order non-disclosure. They submit that non-disclosure should be ordered here for reasons of privacy and privilege.

[13] On the privacy issue, the plaintiffs referred to the Personal Information Protection Act, S.B.C. 2003, c. 63. That Act governs the collection, use and disclosure of personal information by organizations. In the Act "organization" is defined as including a person. However, s. 3(4) provides:

3(4) This Act does not limit the information available by law to a party in a proceeding.

[14] Given other definitions in the Act, it is clear that the present lawsuit comes within the meaning of "a proceeding." Moreover, s. 1 of the Act specifies that "personal information" does not include "contact information."

[15] In my view, there is nothing in the Personal Information Protection Act that would limit the defendant's right under Rule 27(22) to obtain the names and contact information of relevant witnesses.

[16] It is even clearer that the federal Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 has no application here by virtue of s. 30(1), which provides:

30(1) This Part does not apply to any organization in respect of personal information that it collects, uses or discloses within a province whose legislature has the power to regulate the collection, use or disclosure of the information, unless the organization does it in connection with the operation of a federal work, undertaking or business or the organization discloses the information outside the province for consideration.

[17] The present lawsuit relates to matters wholly within the province of British Columbia and the federal act has no application.

[18] Next the plaintiffs say the information requested is privileged. They refer to the decision of the Supreme Court of Canada in *A.M. v. Ryan* (1997), 143 D.L.R. (4th) 1 (S.C.C.) where the court observed at paragraph 20:

While the circumstances giving rise to a privilege were once thought to be fixed by categories defined in previous centuries -- categories that do not include communications between a psychiatrist and her patient -- it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: *Slavutych v. Baker*, [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224 (S.C.C.); *R. v. Gruenke*, [1991] 3 S.C.R. 263 (S.C.C.) at p. 286. The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8, McNaughton rev. (Boston: Little, Brown, 1961), §2285. First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

[19] The plaintiffs submit that the members of the Bible group, for example, may be entitled to a finding that their communications are privileged. Applying the four Wigmore criteria set out in *A.M. v. Ryan*, I cannot find that privilege attaches here. At this stage the defendant Fassnacht is not seeking disclosure of any communications. All he is seeking is disclosure of names and contact information. This information, in my view, does not satisfy the four Wigmore criteria for a finding of privilege.

[20] Next the plaintiffs submit that Rule 27(22) applies only to the disclosure of witnesses who actually witnessed the event that is the subject of the lawsuit. They refer to the decision of the British Columbia Court of Appeal in *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142, which held that Rule 27(22) does not apply to expert witnesses. In that case Seaton J. A. said at p. 161:

I would be surprised if parties at an examination for discovery knew which witnesses they would call. If the word "witness" is to be used with respect to this rule, I think it must refer to witnesses to the occurrence that led to the litigation, not witnesses at trial.

[21] However, Seaton J. A. went on to say at p. 162:

Reading RR. 27 and 28 and the Evidence Act provisions for disclosure, I conclude that R. 27(22) does not have in mind experts, even though a matter in question in the action might be one upon which expert evidence is to be called. I use the term "expert" to describe a witness with no personal knowledge of the facts giving rise to the issue to which his expertise is to be applied - a pure expert. If that suggestion is correct, the doctor who treated the patient would be a person contemplated by R. 27(22), but the doctor who is called in solely to advise counsel and give expert evidence would not.

[22] This latter paragraph makes it clear that "witnesses to the occurrence" is not limited to persons who saw the motor vehicle accident or other tort which is the subject matter of the litigation. It can and does include persons who have personal knowledge of facts in issue in the lawsuit. This interpretation is reinforced by the decision of the British Columbia Court of Appeal in *HMTQ v. Bugbusters*, 2001 BCCA 531 where Finch C.J.B.C. for the Court wrote at paragraphs 9 through 12:

This part of Rule 27(22) was added as part of the 1976 amendments. In a case decided soon after the adoption of the Rule, *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142 at 162 (B.C.C.A.) this court held that there was no longer an exclusionary rule respecting the names and addresses of witnesses. Mr. Justice Seaton for the court held that, in the context of this Rule, the word "witness" must refer to witnesses to the occurrence that led to the litigation, and not witnesses the party proposed to call at trial.

The plaintiff's argument would render the Rule virtually meaningless. It would allow a litigant to defeat the purpose of the Rule simply by claiming that the names and addresses of witnesses placed in counsel's brief were only for persons the party intended to call at trial. The argument is similar to the argument considered and rejected by Mr. Justice Anderson in *Ascencao v. Schmirler* (1979), 10 B.C.L.R. 26 (B.C.S.C.).

Mr. Justice Seaton's reference to "witnesses to the occurrence" in *Cominco*, supra, distinguishes witnesses as to matters of fact from expert witnesses who might be called upon to give their opinions. Rule 27(22), as interpreted by the court in *Cominco*, supra, does not affect any privilege that might attach to the latter class of witness.

The clear purpose of Rule 27(22), as amended in 1976, was to abrogate the privilege previously protecting disclosure of the names of witnesses on matters of fact, and their addresses, in the discovery process. The interpretation contended for by the plaintiff would impair the intended scope of that Rule.

[23] Thus, the names and addresses of the witnesses in this case must be disclosed by the plaintiffs if they are known or reasonably ascertainable. The telephone numbers, however, are not subject to disclosure. Rule 27(22) makes reference only to names and addresses. Moreover, in *B.G. v. British Columbia*, 2002 BCCA 69 the British Columbia Court of Appeal referring to Rule 27(22) and the *Bugbusters* case ordered disclosure of names and addresses of former staff of a residential school but refused to order disclosure of telephone numbers. Levine J.A. delivering the reasons of the court said at paragraph 66:

The telephone numbers of the former staff are not compellable on examination for discovery. Their disclosure could bring about inappropriate direct interference with the physical and social privacy of these individuals. It is not clear that the case management judge considered this issue in ordering the disclosure of the telephone numbers. Balancing the interests of confidentiality and disclosure, I would set aside that portion of the order.

[24] For the same reasons, I would not order disclosure of the telephone numbers in this case.

[25] I note that the other decision referred to by defendant Fassnacht on this issue *Winkler v. Lower Mainland Publishing Ltd.*, 2002 BCSC 40, was decided prior to and without the benefit of the British Columbia Court of Appeal's decision in *B.G. v. British Columbia*.

[26] That brings me to the second issue. The defendant Fassnacht originally sought all credit card statements and all bank account records from three years prior to the accident until the present. At the hearing of this application he modified his request and now seeks those records only from the time of the accident to the present. The basis for the request is not that he believes they will disclose a hidden source of income. Rather, the relevance alleged by the defendant is that an examination of the records may show how well or how poorly the plaintiffs have been able to manage their financial affairs after the motor vehicle accident, and this may be relevant to a determination of the extent of their injuries resulting from the accident.

- [27] All contested issues of disclosure require a balancing of competing interests. Almost any information about a plaintiff's life after an accident could potentially have some relevance on the issue of damages. But some information of a personal nature raises legitimate privacy concerns. The details of a person's financial dealings are personal and should not be subject to disclosure unless their relevance to the lawsuit makes this necessary. In this case, the alleged relevance of the credit card and banking records is tenuous and the privacy concerns are substantial. Balancing these competing interests, I am not prepared to order production of those records.
- [28] To summarize, the request for the names and addresses of the persons referred to in the examinations for discovery is granted. The request for the telephone numbers of those persons is dismissed, as is the request for production of the plaintiffs' credit card and banking statements.

"W.F. Ehrcke, J."

The Honourable Mr. Justice W.F. Ehrcke

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Prepared on 29 October 2026 · Esheria