
CANADA / JUDGMENT

White v. Bysterveld

2016 BCSC 1741

COURT

Supreme Court of British Columbia

DECIDED

23 March 2016

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2016 BCSC 1741 White v. Bysterveld

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

White v. Bysterveld,

2016 BCSC 1741

Date: 20160323

Docket: M125128

Registry: Vancouver

Between:

Sheila White

Plaintiff

And

Derek Glenn Bysterveld

Defendant

Before: The Honourable Mr. Justice Pearlman

Oral Ruling re Plaintiff's Pain Journal

Counsel for the Plaintiff:

Brahm Martz

Counsel for the Defendant:

Maria A. Crawford

Frank Lin

Place and Dates of Trial:

Vancouver, B.C.

March 21-24, 29-31, 2016;

April 1, 4-6 and 8, 2016

Place and Date of Ruling:

Vancouver, B.C.

March 23, 2016

- [1] THE COURT: The defendant applies to exclude from evidence a pain journal kept by the plaintiff from mid-January of 2012 through part of 2013. The pain journal contains regular entries, particularly through the first six months following the accident of December 22, 2011, in which the plaintiff recorded symptoms that she was apparently then experiencing.
- [2] The defendant takes the position that the pain journal does not meet the test for admissibility as past recollection recorded. The defendant also submits that even if the pain journal were admissible in the sense that it met the test for past recollection recorded, it should be excluded on the basis that its prejudicial effect outweighs any probative value it may have. That prejudicial effect flows from its late disclosure.
- [3] I will begin by dealing with the question of whether the pain journal meets the elements of the test for the admissibility of past recollection recorded. There are four elements to that test:
- first, the record must be reliable, typically in the sense that it is recorded by the witness who seeks to introduce it;
 - second, the record must have been made either contemporaneously with the events recorded, or while the events were still sufficiently fresh in the witness's mind that a reliable record of those events could be recorded;
 - third, the witness must confirm the accuracy of the record in the sense that he or she must verify that he or she was endeavouring to be truthful in making the record; and
 - fourth, the witness must have no present recollection of the recorded events.
- [4] Here, the pain journal was kept by the plaintiff and, in my view, meets the first test. For the most part, it consists of entries which were, according to the plaintiff's testimony, made on the dates noted. The first half page or so of entries is dated mid-January. I assume, from the fact that the next entry is dated January the 23rd, that the entries relating to mid-January were made certainly by no later than January the 23rd, and accordingly the record meets the test for time limits.

- [5] Ms. White has testified that she was doing her best to be accurate and so I am satisfied that the requirement for affirmation of accuracy of the record is also met.
- [6] With respect to the last element, the lack of any present recollection of recorded events, the plaintiff has a general recollection of the symptoms that have affected her and which indeed continue, according to her evidence, to affect her. She has a recollection of suffering from dizziness, from whiplash-like symptoms, and from some symptoms which are said to be consistent with a concussive injury.
- [7] However, she testified that she had no real memory of her condition during the six months immediately following the accident, and certainly has no recollection of what particular symptoms may have been troubling her from one day or even one week to the next.
- [8] There is authority that past recollection recorded is admissible when the witness has no recollection of part of the statement that he or she has recorded, but remembers other parts of it. I refer to the decision of Mr. Justice Cromwell, as he then was, in *R. v. Eisenhauer* (1998), 123 C.C.C. (3d) 37. At the time, Mr. Justice Cromwell was a judge of the Nova Scotia Court of Appeal.
- [9] Here, as I have said, what the plaintiff lacks is any memory of the specific symptoms which were affecting her at particular times during the period since the accident, and particularly during the first six months following the accident. In my view, in the particular circumstances of this case, that is sufficient to meet the test for admissibility of the pain journal as evidence of past recollection recorded.
- [10] The real issue in this case is whether, notwithstanding the fact that the journal meets the test for past recollection recorded, it should be excluded because of its late disclosure, and more particularly because of its potential prejudice to the defendant.
- [11] Rule 7-1(9) of the Supreme Court Civil Rules imposes an obligation on the listing party to promptly list any document not previously listed that either has come to the party's attention, was not previously served or listed, or was obtained subsequent to the last list having been prepared, and the document is one that could be used to prove or disprove a material fact.
- [12] Here, the document is potentially material to the proof of the symptoms experienced by the plaintiff from time to time. The pain journal goes back to January of 2012 and was clearly in the plaintiff's possession at the time this action was commenced. Counsel for the plaintiff quite candidly and properly concedes that it ought to have been listed and produced earlier than it was. I am satisfied that this is certainly not a case where the pain journal was deliberately withheld in the hope that some tactical advantage might be gained by its late disclosure. Rather, it was through an oversight on the part of counsel for the plaintiff and his staff that this document was not listed and disclosed earlier.

- [13] Although the pain journal was first listed on March the 4th of this year, it was not until March 18 that defence counsel obtained a copy of it. It may well be that defence counsel had and failed to take the opportunity to obtain disclosure closer to March 4th than March 18th. However, in any event, the disclosure came long after the defendant had retained and instructed his experts.
- [14] In determining whether or not the court should exclude the evidence, there are a number of factors which I have to consider. One is prejudice to the defendant; another is whether the exclusion of the evidence would prevent the determination of a relevant issue on the merits; third is whether a reasonable explanation for failure to disclose promptly has been provided; and the last and overriding factor is whether the ends of justice require that the use of the document be permitted.
- [15] Here, an explanation for the failure to disclose the document promptly has been provided, but that explanation does not excuse the late disclosure.
- [16] With respect to prejudice, as counsel for the defendant points out, she will certainly have an opportunity to cross-examine the plaintiff on the pain journal, if it is admitted into evidence, and so to that extent prejudice to the defence from late disclosure is ameliorated. However, her primary assertion of prejudice is that the pain journal was not available to the defence experts when they prepared their opinions, that they will now have to be provided with the pain journal, and it may very well be that they may revise their opinions. Defence counsel has suggested that an adjournment of the trial might be necessary to permit time for the preparation of revised opinions. That adjournment would prejudice not only the defendant, but also the plaintiff to the extent that the resolution of this matter were delayed. I am satisfied that if the pain journal were admitted in evidence, there would be some prejudice to the defendant.
- [17] I turn next to the question of whether the exclusion would prevent the determination of relevant issues in this case. As I have already noted, Ms. White has some overall recollection of her injuries after the accident, although that recollection is not detailed and is limited. What she does have is the ability to articulate her complaints and to relate them to both the impact on her work and the impact on other aspects of her life.
- [18] I am told that there will be medical records adduced in evidence which provide a medical history and there will be evidence about which of those medical records were available to the various experts for both the plaintiff and the defence, and that those medical records may offer some assistance in providing evidence of what the doctors have recorded as symptoms reported by the plaintiff at various stages in her treatment.
- [19] The pain journal would have some probative value in terms of supplementing and perhaps expanding upon the evidence available through the clinical records and the expert reports of the various physicians who will be called as witnesses at trial.

- [20] I turn next to the question of whether the ends of justice require that the use of the document be permitted. That really comes down to the question of whether the prejudice to the defendant of the late disclosure of the pain journal outweighs any probative value that might flow from admitting the journal into evidence.
- [21] Counsel for the plaintiff has very fairly submitted that while the pain journal has some probative value, it contains little, if anything, that is not available or will not be available elsewhere in the record.
- [22] I have found that there will be some real prejudice to the defendant, in terms of its impact on the defence expert evidence, if the pain journal is admitted. In my view, that prejudice does outweigh the probative value of admitting the pain journal into evidence in this case, particularly where there will be other evidence through the clinical records and the medical evidence of the treating and examining physicians that will address the same matter.
- [23] Accordingly, after weighing all of these factors, my ruling is that the pain journal should be excluded.

"Pearlman J."

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