
CANADA / JUDGMENT

Zeballos v. Barclay

2017 BCSC 2556

COURT

Supreme Court of British Columbia

DECIDED

5 December 2017

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2017 BCSC 2556 Zeballos v. Barclay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zeballos v. Barclay,

2017 BCSC 2556

Date: 20171205

Docket: M158515

Registry: Vancouver

Between:

Leah Zeballos

Plaintiff

And

Steven R. Barclay, Philip John Owen and

Daniel John Tenbrink

Defendants

Before: Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

B. Souza

Counsel for the Defendant, Steven R. Barclay:

E.C. Girard

Place and Date of Hearing:

Vancouver, B.C.

December 5, 2017

Place and Date of Judgment:

Vancouver, B.C.

December 5, 2017

- [1] THE COURT: This is an application by one of the defendants, Stephen Barclay ("Mr. Barclay") for production of documents from a prior motor vehicle accident action that the plaintiff was also the plaintiff in. This action has been discontinued against the other defendants, Philip John Owen and Daniel John Tenbrink.
- [2] The plaintiff was injured in a motor vehicle accident on May 5, 2008 (the "first accident"), which resulted in a writ and statement of claim filed October 3, 2008. The action before me arises as a result of a motor vehicle accident that occurred on November 28, 2013 (the "second accident"). The notice of civil claim was filed on November 25, 2015.
- [3] The injuries alleged in the writ and statement of claim filed October 3, 2008 include severe soft tissue injury to chest wall, left ribs, abdomen, low and mid back, and neck. As a result of the injuries, the plaintiff alleged that she suffered pain as well as a permanent disability, causing loss of enjoyment of the amenities of life, a loss of income, and a reduction in her income-earning capacity.
- [4] In the present action, the plaintiff alleges injury to neck, shoulders, back and headaches and claims damages for pain, suffering, permanent physical and psychological disability, loss of housekeeping capacity, past and future loss of income-earning capacity and opportunity to earn income.
- [5] The response to the present notice of civil claim pleads in defence that the injury, loss, damage or expense alleged were caused or contributed to by the negligence and breach of duty of the plaintiff, other parties named in this action and other parties not named. Mr. Barclay pleads and relies upon the provisions of the Negligence Act, R.S.B.C. 1996, c. 333. In paragraph 7 of Part 3 of his response to civil claim, Mr. Barclay pleads that if the plaintiff sustained injury, loss, damage or expense, it was caused or contributed to by a pre-existing disease, injury or physical condition.

- [6] Mr. Barclay submits that the very existence of these pleadings raises the issue of indivisible injuries and the fact that indivisible injuries are at issue is sufficient to ground the order that is sought here.
- [7] In addition, however, it is submitted by Mr. Barclay that this is buttressed by the expert reports from both accidents.
- [8] The first expert report referred to is a 2008 report from Nora Chambers, who is a registered occupational therapist. The summary and recommendations of that report indicate the following:

Ms. Zeballos sustained multiple injuries, including an L4 fracture in a May 5, 2008 motor vehicle accident. Her children were also injured, the extent which is currently undetermined. She has been able to manage her home and child care responsibilities only due to high levels of family assistance and support. She remains with pain and mobility limitations and will commence physiotherapy in the next week. She and her daughters remain at risk psychologically to develop and retain post-traumatic stress disorder symptomology and will need to be monitored in this area. As well, further monitoring of the children's behaviour and cognitive functioning is required. Psychological assessment and treatment needs to be provided by a practitioner with experience in trauma recovery

- [9] The next expert report is from Dr. Teal, a neurologist, dated August 16, 2010. One of his conclusions is that Ms. Zeballos sustained a grade 2 cervical strain as a result of the motor vehicle accident. The grade 2 cervical strain is defined as neck complaints and musculoskeletal signs that may include decreased range of motion and point tenderness. At paragraph 14 of his report, he notes:

Ms. Zeballos had persisting cervical pain subsequent to the motor vehicle accident. She reports that she has recurrent flare-ups of neck pain, restricted range of motion and stiffness.

- [10] Then at paragraph 17, Dr. Teal notes:

Subsequent to the motor vehicle accident, Ms. Zeballos suffered considerable psychological stress relating to her injuries and persisting pain. Undoubtedly the accident, the injuries and the sequelae of the accident placed additional parental stress on her. She is the sole parent for her two daughters. I defer to psychiatrist or psychological opinions regarding treatment and prognosis of any residual accident-related psychological disorders.

- [11] I then turn to the report of Dr. Paramonoff, a physiatrist, whose report is prepared after the second accident and is dated August 14, 2017. Dr. Paramonoff notes with respect to pre-existing problems:

Before the MVA Ms. Zeballos reports, summarized from appendix 1 history, residual symptoms after a motor vehicle accident in 2008, initial symptoms that involved fracture of L4 lower back, severe muscle tissue damage with symptoms at the neck, trapezius, upper back between the shoulder blade regions, headache, general tension and poor range of motion at the neck, shoulders and between the shoulder blades and achiness in the lower back if she did not stretch.

After the MVA, Ms. Zeballos reports, summarized from appendix 1 history: That night was kind of tense. The next morning stiffness again at the neck, trapezius and upper back regions and also lost range of motion in these areas, headaches. The symptoms progressively worsened within a few days after the subject MVA to the point where she could not move her neck at all. She was bedridden.

[12] Dr. Paramonoff points out that there is a December 7, 2013 chiropractic report to Insurance Corporation of British Columbia ("ICBC") following the first accident, which talked about symptoms including:

cervical neck and thoracic upper to mid back pain, tingling down right arm, exam normal, neurologic exam tender, a limitation range of motion neck, x-rays degenerative changes C5/6/7 disc, diagnosis grade 2 soft tissue injury neck, upper back.

[13] Mr. Barclay relies on several well-known authorities in this area, the first being *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4. Dealing with a prior settlement and the possibility of double recovery, the Court of Appeal said at para. 37:

In these circumstances, I agree with the defendant that the only way to establish objectively what the plaintiff has actually received in compensation for lost earnings is to recognize an exception for these documents that would otherwise have been protected by settlement privilege. Both the relevance and necessity of the documents therefore militate in favour of recognizing an exception.

[14] The Court of Appeal had noted previously at para. 33 that there was a clear relationship between the sums the plaintiff sought from the defendant and the sums the plaintiff may have already received in a settlement with ICBC. At para. 24, the Court of Appeal said:

[24] I am inclined to agree with the chambers judge who said:

[40] I should also say that the Plaintiff's suggestion that the settlement may not have included anything for future income loss is also unsupportable. Mrs. Dos Santos was employed full-time at the time of her injury in the motor vehicle accident. She was not responsible for her injuries in any way. There is nothing before me to indicate that there was any difficulty in proving what her wage loss might have been. There is no reason to believe that any settlement would have been reached without some allotment for future wage loss.

[41] The plaintiff suggested that it is not possible to determine what portion of a global settlement might have related a [sic] future loss of income. The global settlement figure was not simply pulled from the air. It is reasonable to assume that it was arrived at after careful

consideration and negotiation between the parties. It is also reasonable to assume that the negotiations would have included explanations of each party's position and how the settlement figure was arrived at including what it consisted of. The [Sun Life Assurance Co. of Canada v.] Solypa, [2001 BCSC 1346] case referred to in para. 22 makes it clear that the onus will be on the Plaintiff in this case to demonstrate how the lump sum was established.

- [15] Mr. Barclay, therefore, submits that both the pleadings and the evidence that we have raise as an issue that the injuries the plaintiff has sustained from the two accidents are indivisible and that the interest in ensuring there is not double recovery overrides the interest in protecting the settlement privilege here.
- [16] The plaintiff, in opposing the application, says, first of all, that there is not sufficient evidence here, that examinations for discovery should have been held so that the plaintiff's conditions from the second accident and their relationship with the first accident were clear.
- [17] The plaintiff submits that even if the defendant can demonstrate indivisible injury, that the privilege should not be overridden. The plaintiff submits that the difference here is that the plaintiff's injuries were only aggravated temporarily, that she had reached a plateau from the injuries in the first accident, that the second accident aggravated her from that plateau but that she returned again to that plateau and, therefore, the injuries were temporary and had no connection to the first accident and are clearly divisible.
- [18] It is further submitted that the documents sought have no probative value as the October 3, 2008 action settled for a global amount and that the only breakdown that exists is in the mediation brief and it is simply a statement of position, there is no evidence that it was the foundation for the ultimate settlement; further, that the October 3, 2008 action did not settle at the mediation, it was following the mediation, and there was limited recording, if I can put it that way, of the basis for the settlement.
- [19] The parties refer to the decision of the Court of Appeal in *Ashcroft v. Dhaliwal*, 2008 BCCA 352. In that case, at para. 5, it says:

Before the accidents, Ms. Ashcroft was in excellent health. After the first accident, she suffered soft tissue injuries to her neck, shoulders, back, hips, upper arms and legs. The trial judge found, at paragraph 23, that Ms. Ashcroft developed post-traumatic stress disorder, major depressive episode and chronic pain disorder as a result of the first accident. She had returned to work but was still receiving treatment and trying to recover from the first accident when the second accident occurred, aggravating and exacerbating her injuries from the first accident. After the second accident, Ms. Ashcroft permanently lost her ability to return to work.

- [20] In para. 6, the Court of Appeal, talking about the reasoning of the trial judge, says:

Drawing on the concepts as discussed in *Athey v. Leonati*, [1996] 3 S.C.R. 458, the trial judge defined an "indivisible" injury as that "caused or materially contributed to by a tort" and a "divisible" injury as one that has "no causal connection" to the tort. He found that Ms. Ashcroft's injuries from the second accident were "indivisible" from her first-accident injuries and their

consequences because, at the time of the second accident, she had not yet recovered from the first accident and the second accident realized a vulnerability created by the first accident, namely, the risk that her first-accident injuries would be aggravated and exacerbated. Thus, the respondents were fully liable for the entirety of the injuries and their consequences the first tortfeasor had caused Ms. Ashcroft.

- [21] It is the plaintiff's submission that recovery, as referred to in para. 6 of Ashcroft, implies 100 percent recovery. The plaintiff submits that, however, plaintiffs rarely recover 100 percent from motor vehicle accident injuries and I should consider that the reference here to "recovery" should really be equated with his argument of the plaintiff's injuries having "plateaued." If the injuries have plateaued, even if they were temporarily aggravated, assuming they return to their plateaued state, the plaintiff submits that the injuries should be held to be divisible.
- [22] The real point here is that it is not for me to determine whether the injuries are divisible or not. It is for me to determine whether the documents sought are relevant. Here, it is clear that the plaintiff suffered an aggravation of pre-existing injuries in the second accident, both physical and psychological. It is pleaded that her injuries were caused or contributed to by the first accident and the evidence supports the concept of aggravation of those injuries. The arguments that the plaintiff is advancing, in my view, are not about whether the documents themselves are relevant, but are arguments for the trial judge about the divisibility or indivisibility of the injuries.
- [23] The positions of the parties are clearly opposed on that point, but that does not mean that the documents are not relevant. If they go to a material issue, they are relevant and should be produced. Here, in my view, they go to a material issue, and that is the risk of double compensation for injuries that the plaintiff sustained in two different accidents. Thus, in my view, the documents are relevant.
- [24] The other issue is, are the documents necessary? Well, as far as I can tell from the submissions before me, they are the only evidence that is available, and it may not be good evidence, but it is the only evidence that is available of how the plaintiff's settlement was structured in the first action. As a result, in my view, the production of the documents is necessary and, therefore, the order will go, but it will not go in the words sought in the notice of application. I would suggest the wording, and I will ask your submissions on this, but my suggestion is:

correspondence and other documents directly relating to the settlement of the May 5, 2008 motor vehicle action and the quantum thereof that are not otherwise covered by solicitor/client privilege.

[DISCUSSION]

- [25] THE COURT: What I have got is:

documents directly relating to the settlement of the May 5, 2008 motor vehicle action and the quantum thereof that are not otherwise covered by solicitor/client privilege.

[26] MR. SOUZA: I am comfortable with that, Your Honour.

[27] THE COURT: All right. Does that cover it?

[28] Oh, costs, I suppose. What do you say about costs, gentlemen?

[29] MR. GIRARD: Your Honour, due to the complicated nature of the application, I am comfortable with costs in the cause.

[30] THE COURT: Mr. Souza?

[31] MR. SOUZA: I am agreeable to that.

[32] THE COURT: All right. Costs in the cause, then.

"Master Muir"

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