

for damages sustained in a motor vehicle accident in 2001. She refuses on the basis of settlement privilege and lack of relevancy.

FACTS:

[2] The plaintiff was involved in a slip and fall accident on June 15, 2005. She particularized her injuries, from that accident only, in a statement of claim issued April 21, 2006. She was examined for discoveries in that law suit on April 1, 2009.

[3] I surmise that a number of undertakings and refusals were given. The only refusal that remains that requires a decision from this court is the refusal to give details of the settlement reached in the motor vehicle accident of 2001.

[4] The particulars of the plaintiff's injuries in the statement of claim issued in the slip and fall accident are virtually identical to those particularized in the motor vehicle statement of claim.

[5] The motor vehicle litigation settled in March 2008, by way of an all inclusive lump sum amount encompassing various heads of damage as well as interest, costs and disbursements.

[6] The plaintiff swore at her slip and fall discoveries that she continued to have some pain and discomfort from the 2001 accident.

[7] The parties concede that there is some overlap of injuries from the 2 accidents.

POSITIONS OF THE PARTIES:

[8] The defence argues that it requires the information it seeks to prevent double recovery for both pain and suffering as well as other heads of damage such as economic loss or future care costs. It also argues that the legislation in 2001 was such that the plaintiff had to have suffered a serious and permanent injury to maintain that litigation. As such they argue that the amount of the settlement would be indicative of the degree of permanency and seriousness of her injuries from the 2001 accident which would be relevant to the degree of permanency and seriousness of her injuries in the 2005 accident.

[9] The plaintiff argues that since she has agreed to provide the defence with all medical reports and A.B. file from the motor vehicle accident of 2001 the amount of any settlement is not relevant, and is privileged.

ANALYSIS:

[10] Plaintiff's counsel cites Pangburn v. Leeder-Kroyer [2003] O.J. No. 5025 as authority that the amount of a settlement is privileged and not relevant. In that case, as the defence already knew the amount of the all inclusive settlements of the 2 prior motor vehicle accidents, it was

seeking correspondence between counsel regarding the settlement to determine what amount was attributable to economic loss. Justice Hockin dismissed the motion as he felt that the amount the lawyers attributed to the economic loss in the two prior accidents was not relevant. He held that:

“What plaintiff’s counsels’ view of the plaintiff’s claim for economic loss in settled actions is not something that can be acted upon in the case of successive tort feasons.”

[11] I was also referred to Chappel v. Dysko [2008] O.J. No. 13 where Justice Browne in a very similar fact situation to the case at bar refused to order the plaintiff to reveal the global amount of a prior motor vehicle injury settlement. Justice Browne quotes with approval Justice Binder in Milicevic v. Jakubec [2005] A.W.L.D. 3599 where he states:

“Although the “overcompensation” or “double recovery theory” advanced by the Defendant in this appeal appears attractive at first blush, upon analysis I am of the view that the Defendant has not established that such concerns are relevant and material...

In my view what is relevant and material is the medical condition of the plaintiff at the moment before the 2001 accident. This condition will be the starting point in determining whether as a result of the negligence of the Defendant, the plaintiff’s medical condition was adversely affected and if so to what extent, and the amount of compensation the plaintiff is entitled to receive to compensate him for any additional injury sustained by him.”

[12] Justice Browne accepted the reasoning in Pangburn and Milicevic that settlement privilege was applicable and the amount agreed to was not relevant to the subsequent litigation.

[13] The defence referred me to Kay v. Posluns [1989] O.J. N9. 1914 and Air Canada v. McDonnell Douglas Corp. [1995] O.J. No. 195, as authority that the test for the suitability of a

question on discovery is the “semblance of relevancy”, and the ultimate admissibility of such answers is for the trial judge. I agree.

[14] The real issue is whether there is any semblance of relevancy that outweighs settlement privilege in this case.

[15] Counsel for the defence also referred me to Pete v. Lanouette [2002] B.C.J. No. 116, where settlement amounts were ordered released. I was also referred to Allison v. Duffus [2006] O.J. No. 4312 where Justice Clark quoted favourably from Pete v. Lanouette, supra:

“Much mischief would be had in these proceedings if, in fact, the plaintiff has already been compensated for “permanent physical disability” and a perspective [sic] “loss of earnings”, and a “loss of opportunity to earn income and a diminished capacity to earn income”, claims she has made in this action.

In effect, there is a real possibility here that without the disclosure of the settlement documents and the information requested, the plaintiff could be compensated again for injuries for which she has already received compensation.”

[16] The principle against double recovery is stated in Ratych v. Bloomer, [1990] 1 S.C.R. 940:

“It is a fundamental principle of tort law that an injured person should be compensated for the full amount of his loss, but no more..The plaintiff is to be given damages for the full measure of his loss as best that can be calculated. But he is not entitled to turn an injury into a windfall”.

[17] DOS Santos v. Sun Life Assurance Co. [2005] B.C.J. No. 5 (B.C.C.A.) was cited as requiring production of settlement documents. That case is distinguishable from the one at bar as the plaintiff was claiming long term disability through employment. She was involved, as well in a motor vehicle accident, which she settled. The subrogation clause in her disability insurance allowed Sun Life to recover back 75% of net recovery from loss of income in any action.

[18] The trial judge in the case at bar, will determine if there are overlapping and ongoing injuries from the first accident to the second. That will be decided based on the evidence, including the medical reports and A.B. file from the first accident. It will not be determined based on the settlement number agreed to in the first accident. The trial will determine the value of the plaintiff's injuries, assuming they are ongoing and overlapping, as of the day before the second accident. A determination will then be made of the plaintiff's global damages. The trial judge will then deduct the first from the second to arrive at the proper award for the injuries in the second accident for which the defendants in this case will be responsible.

Long v. Thiessen (1968), 65 W.W.R.
Hicks v. Cooper (1973), I.O.R. (2d) 221 (C.A.)
Misko v. Doe [2008] 87 O.R. (3d) 517 (O.C.A.).

[19] In the case Ashcroft v. Dhaliwal, [2008] B.C.J. No. 1742 (B.C.C.A.) the plaintiff settled the second accident and went to trial on the first. The trial judge assessed global damages and

then ordered that the settlement amount from the second accident be deducted. On appeal the B.C.C.A. stated:

“Because the settlement amount was not disclosed to the trial judge, and was likely protected by settlement privilege (my emphasis), the trial judge was correct to order that the settlement proceeds be deducted from the global award of \$400,000.00.”

[20] The second method of determining the plaintiff’s damages from the second accident is known as the “percentage method” whereby the trial will assess the global damages and then apportion the percentage of responsibility to the defendants in each accident.

Pryor v. Bains (1986), 69 B.C.L.R. 395 (C.A.)

[21] The percentage method is less common in Ontario but by either method the defendants in the case at bar will only pay those damages attributed solely to their accident. As Justice Rosenberg stated at paragraph 25 in Misko v. Doe, supra, after describing the two methods of determining responsibility of the defendant in the second accident:

“Either way, Liberty Mutual will be responsible only for the portion of damages attributable to the second driver.”

CONCLUSION:

[22] The onus is on the defendants to persuade this court that semblance of relevancy outweighs settlement privilege. They attempt to do that by arguing the information is necessary to prevent the “mischief of double recovery”. Such an argument falls flat where, as in this situation, the defendants will only be responsible for the damages they caused. They will know what injuries and damages the plaintiff suffered in the first accident by way of the medical reports and A.B. file supplied. They will also know the injuries and damages sustained in the second accident from the evidence accumulated subsequent to its’ occurrence. The court will determine what the damages are in the second accident, and those of course, are the only damages the plaintiff is claiming and the only damages these defendants will be responsible for. What this plaintiff received by way of settlement in the first accident cannot possibly be relevant to the damages which may be assessed against these defendants in this action.

[23] The motion is therefore dismissed. The plaintiff will have her costs. If the parties are unable to agree on the amount they may file written submissions of no more than 3 pages double spaced in addition to any relevant offers and draft bills of costs.

ARRELL, J.

Released: October 27, 2009

COURT FILE NO.: CV-06-24038
DATE: 2009/10/27

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

LYNDA ANDERSON and GRANT ANDERSON

Plaintiffs

- and -

CARA OPERATIONS LIMITED carrying on
business as MONTANA'S COOKHOUSE, and
DESJARDINS FINANCIAL SECURITY LIFE
ASSURANCE COMPANY

Defendants

REASONS FOR JUDGMENT

ARRELL, J.

Released: October 27, 2009