IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Lamond v. MacLean, 2008 NSSC 232

Date: 20080725
Docket: SH 259258
Registry: Halifax

Between:

John Charles Lamond

Plaintiff

v.

Lauchie MacLean

Defendant

D E C I S I O N

Judge: The Honourable Justice Gerald R P Moir

Heard: 8 May 2008 at Halifax

Counsel: Ms. C Patricia Mitchell for the plaintiff
Mr. Michael Dull for the defendant

Moir J.:

[1] Mr. Lamond suffered a slip and fall at Mr. MacLean's property in September, 2002. This action was started three years later. Ms. Mitchell discovered Mr. Lamond in November, 2007. Counsel for Mr. Lamond stopped two lines of questioning.

[2] The defendant moves for an order requiring the plaintiff to answer Ms. Mitchell's questions. Mr. Lamond concedes he must answer one of the lines, and I will grant an order to that effect.

[3] The second line of questions has to do with the settlement of claims for injuries arising from two motor vehicle accidents that occurred years ago.

[4] Mr. Lamond was questioned at discovery about his complaints after the injuries in 2002. He said he suffers pain in his right knee and leg. As regards his leg, he explained that the right femoral muscle is ruptured, and one can see a large lump on the side of his leg. Mr. Lamond said that, as a result of the rupture, he suffers constant pain in the form of a burning sensation.

[5] He has suffered from a degenerated disease in both knees but, after the fall, the left knee got much worse. One knee has been replaced, and the other may have to be.

[6] Mr. Lamond attributes his osteoarthritis to overuse and age. He mentioned basketball injuries when he was in high school. He consulted Dr. Stanish in the 1970s or 1980s. He understands that the disease will get worse, and his experience is that it worsened over the years.

[7] Mr. Lamond was questioned about motor vehicle injuries. In 1969, he broke his femur and suffered contusions and abrasions to his right leg. He required a femoral nail, which was removed after six months or a year. He says there were no residual problems at all. These injuries resulted from a single car accident. He was the driver.

[8] In 1971, Mr. Lamond was driving on the Bicentennial Highway to take his wife to work. A young man driving the other way was speeding and he lost control. His car came into Mr. Lamond's path and, some details aside, he eventually ran into the Lamond vehicle. Mr. Lamond suffered injuries to his nose, face, spleen, and ribs. He missed two weeks of work. He says he had no residual problems.

[9] At the discovery, Ms. Mitchell asked questions about compensation paid to Mr. Lamond for injuries sustained in the accidents. At question 1122 Ms. Mitchell said of the 1969 accident:

> And I'm assuming, since it was a single vehicle accident, that you went off the road, you didn't receive compensation for that accident?

Although Mr. Lamond's counsel objected, he affirmed Ms. Mitchell's assumption.

[10] Ms. Mitchell, after a discussion with Mr. Lamond's counsel, asked question 1121:

> I'm going to ask you, on the record, whether or not you received financial compensation as a result of the accident in 1971?

Ms. Harris said to her client "And I'm going to advise you not to answer that question." Mr. Lamond followed the advice.

[11] The defendant seeks an order requiring Mr. Lamond to answer questions about any settlement arising from the 1969 and 1971 accidents. The relevance of this information is said to be that the magnitude of the settlement may shed light on the magnitude of the 1969 and 1971 injuries. The magnitude of the injuries could be relevant to causation, including the assessment of damages for possibly worsening an underlying degenerative condition.

[12] Inquiries at discovery into settlement of a previous claim may give rise to two distinct issues. The first is an issue that may arise whenever any question is asked on discovery: Does the information sought bear a semblance of relevancy to an issue in the proceeding (or have the potential to lead to relevant evidence)? Secondly, there may be a residual privilege by which the privilege for settlement discussions extends to the settlement agreement itself.

[13] Ms. Mitchell refers me to three Nova Scotia authorities. She submits each holds that "information relating to settlement agreements for similar injuries sustained in previous accidents is relevant for the purpose of Rule 18".

[14] The first is *Hodgson* v. *Timmons*, [2006] NSJ 391 (SC), a decision of Justice Hall. The plaintiff sued for compensation for personal injuries arising from a motor vehicle accident. She had been injured in another accident in 1995 and had settled a claim for that injury. The decision does not indicate when the second accident occurred or what injuries were sustained in either. However, they were sufficiently close that Justice Hall found that information on the settlement of the first claim "may assist in determining whether there may be an overlap in damages" and "if there was a substantial award ... it would indicate that the injuries were serious and possibly persistent and permanent".

[15] The second decision is *McMullin* v. *East Port Properties Limited*, [2006] NSJ 467 (SC), a decision of Justice Goodfellow. The plaintiff claimed to have become disabled, and she took action against her employer for wrongful dismissal and against her disability insurer for long term disability payments. The claim for damages against the employer exceeded the usual measure. It included claims against the employer for the long term disability benefits themselves. She settled with the disability insurer. Her former employer inquired about the settlement. Justice Goodfellow found at para. 21 "There is a very high level of duplication of the damage claims against manufacturers and the other defendants".

[16] Lastly, I am referred to *Berta* v. *Armstrong*, [2007] NSJ 537 (SC), a decision of Associate Chief Justice Smith. However, in that case both parties were agreed "that the information sought is relevant" (para. 13). It was a case about the possible extension of the settlement discussion privilege.

[17] I agree with Mr. Dull that the facts of this case are far removed from those in *Hodgson* or *McMullin*. In my opinion, each instance of an inquiry, for discovery or disclosure, into a settlement or award for previous losses must be assessed on the facts. In my assessment, no semblance of relevance exists between compensation obtained by Mr. Lombard for injuries sustained in 1969 and 1971 and the claim for injuries suffered in 2006.

[18] No claim was made for the injuries sustained in 1969. Moreover, the discovery evidence makes it clear that there was a quick recovery almost forty years ago.

[19] A claim was made for the 1971 injuries, and the evidence provided to me indicates that the other party was entirely responsible for those injuries. However, they were inflicted on different parts of Mr. Lamond's body than is the case with the present injuries. Moreover, he managed to return to work two weeks after the accident, which occurred over three decades ago.

[20] There is no need for me to delve into the second issue. The question of whether there is a residual privilege when a settlement agreement is made gives rise to fundamental policy considerations. It was not resolved in *Berta*, in which the Associate Chief Justice decided that the case clearly fell within an exception even if the privilege exists. I think it better not to provide an alternative analysis in this case either.

[21] Counsel may provide written submissions on costs, if they require a ruling on that subject.

J.