SUPREME COURT OF NOVA SCOTIA

Citation: Fisher v. West Colchester Recreation Association, 2010 NSSC 358

Date: 20100930
Docket: Hfx No. 142886C
Registry: Halifax

Between:

Louitta Fisher — Plaintiff

and

West Colchester Recreation Association — Defendant

DECISION

Judge:	The Honourable Justice Kevin Coady
Date of Hearing:	September 13, 2010
Counsel:	Gordon Proudfoot Q.C., counsel for the plaintiff Murray Ritch Q.C., counsel for the defendant

Coady, J.:

[1] On March 2, 1996 the Plaintiff Louitta Fisher attended at the Defendant's ice rink at Debert, Nova Scotia to observe a gentlemens hockey game. She was seated in the spectators' bleachers when she was struck in the head by a puck which had been shot by one of the players. As a result, she sustained a serious brain injury and she was left with deficits in cognition, mobility and communication.

[2] On January 30, 2002 this Court issued an order appointing the Plaintiff's mother, Anne Marie MacDougall guardian ad litem for the Plaintiff. She replaced the Plaintiff's husband as guardian.

[3] An Originating Notice and Statement of Claim issued on October 6, 1997. It stated that Ms. Fisher "suffered a grievous head injury which has caused her to be permanently and totally disabled." It alleged negligence on the part of the Defendant as follows:

- the Defendant failed or refused to provide proper safeguarding of spectators, by way of proper netting, screening or other means;

- the Defendant impliedly encouraged the Plaintiff, as spectator, to seat herself where she did, inter alia by providing heated seating in the upper, unprotected rows of seats;

- the Defendant failed to warn the Plaintiff of the danger of seating herself where she did;

- the Defendant failed to exercise a reasonable standard of care in safeguarding spectators contrary to and below the custom or standard for arena operators;

- such other negligence as may appear.

Ms. Fisher seeks general and special damages including loss of future earning capacity and cost of future care.

[4] The Defendant responded by denying any negligence and asserting "that it exercised all necessary, appropriate and reasonable standards for spectators." The Defendant plead inevitable accident and contributory negligence.

[5] On March 31, 2003, this Court granted an order severing issues of liability and damages and directing that the issue of liability proceed to trial upon the filing of a Notice of Trial by either party. The trial is scheduled to be heard by a jury on November 1, 2010.

[6] The Plaintiff filed two (2) interlocutory motions in advance of trial. They are as follows:

- An order amending its expert brochure of experts Steven Bernheim and Dr. John Dickinson pursuant to *Civil Procedure Rules (1972)* namely Rules 15, 31.08 and 31.10.
- An order to amend the Statement of Claim pursuant to *Civil Procedure Rules (1972)* namely Rules 1.01, 15, 31.08 and 31.10.

[7] The Defendant filed two (2) interlocutory motions in advance of trial. They are as follows:

- An order that the Plaintiff not be permitted to testify at the trial of this action.
- An order that the Plaintiff provide a complete copy of the Abacus Security file including all reports, information, and investigations.

All four (4) motions were heard together. I will deal with the Defendant's motions first as that is the order they were argued.

Testimony of Louitta Fisher:

[8] The Defendant does not dispute the fact that the Plaintiff was struck by a puck during the March 2, 1996 hockey game. However, they argue that the Plaintiff's deficits in cognition and communication make it impossible for her to effectively communicate evidence to the jury. They further argue that these limitations will preclude any sort of cross-examination. The Defendant submits that the Plaintiff's deficits are so severe as to render her incompetent to testify on liability.

[9] The Defendant relies on the Plaintiff's medical records to support their position. The parties acknowledge that these records are silent on whether Ms. Fisher has any personal recollection of the injuring incident. The surprising absence of such information has caused the Defendant to conclude that Ms. Fisher has no recollection as a result of her brain injury. I note that Ms. Fisher has never submitted to discovery examination.

[10] Mr. Ritch's affidavit of August 4, 2010 advances the medical evidence that he feels supports his position. The following is a sample of that evidence:

- Ten minutes after being struck, the Plaintiff lost speech and passed out.
- On arrival at the hospital she displayed a dropping Glasgow Coma Scale and was in seizure.
- In 1997 Ms. Fisher continued to experience limitations to vocal expression and that it was uncertain whether she comprehends the long term consequences/implications of material that is presented to her.
- In 2002 Dr. Braha, a neuropsychologist, stated that the Plaintiff continued to display marked speech difficulties and that her performance on tests of attention and concentration is compromised by frequent and sustained difficulties with tone, contractures and fatigue or reduced arousal.
- Dr. Philips' 2007 report indicates that the Plaintiff's methods of communication involve nodding "yes" or "no" when asked questions, mouthing the words "yes" or "no", tapping her foot on the ground when a correct response is given, and using a message board devised by her family.
- Dr. Philips further reported that Ms. Fisher may require someone who is quite familiar with the above methods to interpret her responses to questions.

The Defendant submits that given liability is the only issue in this trial, "the probative value of any information which the Plaintiff recalls is far outweighed by the prejudicial effect to the Defendant of allowing her to testify before the jury."

[11] The Plaintiff advances the position that it is her "right" to testify in this trial and that it would require exceptional evidence to deprive her of that right. Mr. Proudfoot argues that Ms. Fisher is not globally incompetent and that there are tools available to compensate for her cognitive and language deficiencies.

[12] The parties agree that the fact Ms. Fisher has a litigation guardian does not equate to incompetence to testify. I agree with this proposition.

[13] I accept Mr. Proudfoot's submissions that this Court must accommodate persons with cognitive and language limitations. I also accept that if there are concerns about a witness' testimony, it should go to weight. I suggest that to do otherwise would be discriminatory. I believe that section 14 of the *Canadian Charter of Rights and Freedoms* and section 6 of the *Canada Evidence Act* demands accommodation.

[14] It is my view that the critical issue on this motion is whether Ms. Fisher has any independent memory of the events preceding the accident, the accident and events immediately following the accident. While it appears as if this litigation proceeded on the acceptance that Ms. Fisher had no recollection of these events,

that conclusion has been displaced by Mr. Proudfoot's oral arguments. He advises this Court that Ms. Fisher does have an independent recollection of the events of March 2, 1996 and is able to express those memories through a series of unique and challenging techniques. While the medical reports do not speak of any recollection, they do not eliminate recall and ability to communicate.

[15] I accept the Plaintiff's position that the general rule is that every person is entitled to testify in a civil or criminal trial. I also accept that a witness must have relevant and admissible evidence to offer to a Court. In light of Mr. Proudfoot's submissions, I must allow Ms. Fisher to testify. If it turned out that Ms. Fisher had no independent recall of events, then I would not permit her to give evidence on the issue of liability.

[16] This ruling does not preclude the application of section 16 of the *Canada Evidence Act*, should the Plaintiff's competence be put in issue at the trial.

Abacus Security File:

[17] It is not surprising that the Plaintiff's family was greatly upset by the events of March 2, 1996. Ms. Fisher's father retained Abacus Security to conduct an investigation. The purpose of the investigation was to determine what happened and whether there were facts to indicate whether the puck was shot over the protective glass intentionally or carelessly. Abacus Security produced a report dated May 13, 1996.

[18] This accident occurred in a small and tight-knit community. Ms. Fisher's father did not want the community to know he was the impetus behind the investigation. In an effort to achieve anonymity, independent counsel was retained to receive the report and to provide legal advice on the findings. This cloaked the report with solicitor-client privilege.

[19] It is unclear when Mr. Proudfoot acquired a copy of the report from the Plaintiff's father. In any case, the Plaintiff resisted requests for the production of the report and the investigative file. I am satisfied that Plaintiff's counsel does not

possess a copy of the background file and that Abacus has gone out of business and that their personnel and file cannot be located.

[20] Prior to this motion, the Plaintiff provided the Defendant with a copy of the Abacus report. The report references statements taken from various witnesses as well as notes taken of conversations with witnesses who refused to give statements. The produced report contains redactions. Plaintiff's counsel supports the redactions as irrelevant to the issue of liability. Defendant counsel argues that none of the redactions are labelled "privileged" and that instead they are labelled "irrelevant, opinion and/or speculation".

[21] The Defendant accepts that expressions of opinion by lay persons with respect to legal issues are irrelevant and need not be disclosed. The Defendant points out, however, that where statements of opinion are closely mixed with those of fact, or are closely intertwined with the very issues of the case, they must be disclosed. (*Sydney Steel Corp. v. Mannesmann Pipe and Steel Corp.* (1985) 69 N.S.R. (2d) 389.

[22] The Defendant suggests the following approach to the redaction issue:

> The Defendant submits that the most reasonable approach to this issue is for the Court to be provided with a copy of the unredacted report and to provide its determination on the redacted portions.

The Plaintiff suggested and supports this approach. This Court accepts that this is the most effective and efficient way to resolve this issue. Accordingly, I order production of the unredacted materials to the Court and I will issue an addendum to this Decision disclosing my determinations.

[23] In relation to the Abacus investigative file, the Defendant does not suggest that Mr. Proudfoot has access to this file. They, however, suggest that I contingently order production in case the file surfaces. The Plaintiff argues against disclosure on the basis of "if something comes up". The Plaintiff is not prepared to surrender any possible legal objections to file materials they have not yet seen.

[24] In accepting that the Plaintiff does not presently have access to the investigative file, and has no expectation of obtaining such access, I see no merit in a contingency ruling. These materials were produced 15 years ago and it is

unlikely they will suddenly "pop up". In the event they do, I would expect Plaintiff's counsel to advise Defendant's counsel and the Court. A mechanism similar to that ordered on the redaction issue could be put in place to resolve any issues arising from review of the file. If no mechanism can be agreed upon, I would consider a further motion prior to trial.

[25] The Plaintiff has advanced two (2) motions and I will deal with them in the order they were argued.

Amendment of Statement of Claim:

[26] The Plaintiff seeks leave to amend her 1997 Statement of Claim in the following two (2) respects:

- That the Defendant was negligent in not keeping the lower rows of seats free from mud, slush, wet and snow.
- That the Defendant was negligent in that the height of the stands was such that it negated any protection provided by the dasher boards and plexiglass screens.

The Plaintiff argues for the inclusion of the following specific paragraphs in the Statement of Claim:

> the Defendant was negligent in the construction and maintenance of an elevated spectator stand that exposed spectators directly to flying pucks when they were seated in the second, third and fourth rows;
>
> the Defendant was negligent in failing to properly maintain and clean the seating surfaces in the arena in the first row such that it prevented or discouraged spectators from sitting in the first row of seats, which would provide complete protection and as a result spectators seeing the dirty and muddy seats in the first row would sit in the second, third and fourth rows where they were directly exposed to flying pucks;

The Plaintiff describes these proposed amendments as "housekeeping" while the Defendant views them as changes that "will turn the case inside out". The Plaintiff argues that these proposed amendments create nothing new and do not cause prejudice to the Defendant. They argue that these areas have been explored on Discovery Examinations and considered by the experts. The Defendant disputes both of these arguments.

[27] The Defendant advances the following arguments against this motion:

- The Plaintiff filed her Notice of Trial and Certificate of Readiness in 2005.
- The Plaintiff proposed joining Fulton Engineering as a party in 2007 on the same foundation they now seek these amendments. The Plaintiff did not bring the 2007 application and nothing more has been done about it. The Defendant argues that this motion is an effort to compensate for not bringing the party application.

- The Date Assignment Conference was held in 2008 during which Plaintiff's counsel advised that pleadings were complete and that no amendments were required.

- The Plaintiff in a 2010 pre-trial conference did not indicate amending the Statement of Claim as an outstanding issue.

- The first time this was raised was at a Trial Readiness Conference on September 3, 2010.

- These proposed amendments will cause significant prejudice to the Defendant.

[28] Civil Procedure Rule 15.01 (1972) addresses amendments and is set out as follows:

> 15.01 A party may amend any document filed by him in a proceeding, other than an order,
> (a) once without the leave of the court, if the amendment is made at any time not later than twenty (20) days from the date the pleadings are deemed to be closed or five (5) days before the hearing under an originating notice;
> (b) at any other time if the written consent of all the parties is filed;
> (c) at any time with the leave of the court.
>
> 15.02 (1) The court may grant an amendment under rule 15.01 at any time, in such manner, and on such terms as it thinks just.

Obviously, this motion is proceeding pursuant to Rule 15.01(c).

[29] The cases cited by the Plaintiff establish that the granting of a late amendment is a matter of discretion and that prejudice to the opposing party is a

significant consideration in exercising that discretion. In *Scott Maritime Pulp Limited v. B. F. Goodrich Canada Limited* (1977) 19 N.S.R. (2d) 181 (N.S.C.A.), the Court indicated that the overriding consideration in the exercise of the Court's discretion in granting an amendment to pleadings is whether it would cause an injustice to the other side that could not be compensated for by costs. In *Shore v. Cantwell* (1995) 21 N.S.R. (2d) 288, the Court indicated that it has the power to allow amendments where the opposite party would not be seriously prejudiced.

[30] In *Global Petroleum Corporation v. Point Tupper Terminals Ltd.* (1998) 170 N.S.R. (2d) 367, Bateman J. commented on the rules of amendment as follows:

> The law regarding amendment of pleadings is not complicated: Leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs.

I do not see a role for costs in the resolution of this motion as the trial is weeks away. It is all about prejudice to the Defendant and compliance with the rules. Further, I do not conclude that bad faith plays a role in this motion. It may be that there is no excuse for the lateness of this motion but that does not equate to bad faith.

[31] The Defendant also rightfully argues that Rule 28.05(3) (1972) directs that "leave of the court pursuant to Subsection 2 of this Rule shall be granted only in exceptional circumstances." They submit that the Plaintiff has not established such circumstances. The Defendant submits that the proposed amendments will cause them significant prejudice at trial.

[32] In *Vassallo v. Vassallo*, [1991] N.S.J. No. 68 (S.C.), Goodfellow J. commented on "exceptional circumstances" as follows:

> I think "exceptional" has to be something unusual or out of the ordinary and something other than what has transpired here.

And further:

> I said a moment ago that the Notice was filed by Ms. Conrad. What happens when counsel file a Notice of Trial and there is not any objection to it, is that counsel lose the control of the file and control of the file shifts to the court. **Then, in order to proceed with any discovery or interlocutory proceedings, a party must establish that special circumstances exist. In the circumstances before me, I find that the onus of establishing special circumstances has not been made and the application must be dismissed.**

[33] I have reviewed the discovery attachments to Mr. Proudfoot's September 7, 2007 affidavit. I have reviewed the expert reports. I am satisfied that the proposed amendments should be ruled on separately. The first proposed amendment relates

to "the construction and maintenance of an elevated spectator stand." While the stands were discussed at discovery and in the reports, those discussions were not about construction and maintenance. I will not allow this amendment because it would cause the Defendant substantial prejudice. There are no exceptional circumstances at play.

[34] The second proposed amendment is another matter. It addresses maintenance and cleaning of a part of the spectator stands. The Statement of Claim already alleges negligence in that general area:

> (b) the Defendant impliedly encouraged the Plaintiff, as spectator, to seat herself where she did, inter alia by providing heated seating in the upper, unprotected rows of seats;
>
> (c) the Defendant failed to warn the Plaintiff of the danger of seating herself where she did;
>
> (d) the Defendant failed to exercise a reasonable standard of care in safeguarding spectators contrary to and below the custom or standard for arena operators;

The discovery transcript and the expert reports touch on this evidence. I see no prejudice to the Defendant.

[35] I grant leave to the Plaintiff to make the second amendment. The application in relation to the first amendment is dismissed.

Amendment of Experts' Brochures:

Dr. John Dickinson:

[36] The Plaintiff advances a one (1) page report from Dr. John Dickinson who practices in the Department of Ophthalmology at Dalhousie University. He is described on his letterhead as practicing in the area of "Diseases and Surgery of the Retina, Vitreous and Macula." He does not have a professional relationship with Ms. Fisher. The essence of Dr. Dickinson's report is found in the final paragraph of his report. It clearly addresses the issue of liability.

> As you have noted, I was co-author of a letter which was published in The New England Journal of Medicine in 1993. Our recommendation at that time was that hockey rinks should provide netting around the entire perimeter of the rink so that spectators would be protected from injury. I would like to note that as late as this year, I have dealt with a patient who has lost all functional vision in an eye due to this exact mechanism of injury. It was and remains my opinion that hockey arenas should provide appropriate safety for their spectators. It is extremely unfortunate that we continue to see injuries of this sort which are so very preventable.

[37] On March 18, 2005, the Plaintiff filed a Notice of Trial with a Jury at Halifax and Certificate of Readiness and stated as follows:

> Expert evidence will be adduced on behalf of my client and experts' report prepared by Steven Bernheim, Chris Fairclough and Dr. John Dickinson in accordance with Rule 31.08 are enclosed and attached hereto and marked as Schedule "A";

The one (1) page report was attached to this Notice. However, the attached article was from the *Canadian Journal of Ophthalmology* in 1992. The Plaintiff asks to amend this expert report by removing the Canadian article and replacing it with the *New England Journal of Medicine* article. I have reviewed both and they are the same. It is the *New England Journal* Report that is referenced in Dr. Dickinson's report.

[38] Civil Procedure Rule 15.01 (1972) permits any party to amend any documents, other than an order, "at any time with the leave of the Court." I see no prejudice to the Defendant in allowing this motion. It is not a new document and is well known to the Defendant. I cannot conclude that granting this motion creates any advantage for the Plaintiff, or prejudice to the Defence.

[39] I grant the Plaintiff leave to amend Dr. Dickinson's report as requested.

Steven Bernheim:

[40] Plaintiff's counsel filed a solicitor's affidavit in support of this motion which states at paragraph 4:

> That we received certain Marsh Adjustment materials in support of the Plaintiff's Bernheim expert report which were given to Murray Ritch at the time but were not included in the Bernheim Expert Brochure but should be, true copies of which are attached hereto and marked **Exhibit "C"**.

Mr. Bernheim is described as a "Sport and Recreation Consultant". He provided a report to the Plaintiff on September 13, 2004 which stated at page 5:

> It is my opinion with a degree of professional certainty that the West Colchester Recreation Association was negligent in not providing a proper safety net or glass for spectators and to Ms. Fisher.

And Further:

> Also, due to the tiering of the bleachers, the three feet of glass was inadequate to protect the spectators. Therefore, based on the measurements that I had and the height of the walkway, there was only five feet of protection.

[41] The materials referred to as Schedule "C" to Mr. Proudfoot's affidavit are the File of Marsh Adjustment Bureau. They were retained by the Plaintiff to survey

the boards and bleachers at the West Colchester Arena as well as at seven (7) other arenas in the area. These documents are individual assessments of each rink and a grid that allows for comparison.

[42] Mr. Bernheim prepared three reports over the term of this litigation. The first report dated September 13, 2004 was attached to the Plaintiff's Notice of Trial With a Jury and Certificate of Readiness filed March 15, 2005. A second report dated June 7, 2006, and a third report dated July 6, 2006, followed.

[43] A review of the June 7, 2006 report indicates that it is, for the most part, similar to the 2004 report. It advances the same opinion. The July 6, 2006 report is referenced as an "amendment" to the June 7, 2006 report. That "amendment" related to the timing of the development of standards for hockey rinks.

[44] The Plaintiff submits that "it became abundantly clear that the height of the stands in relation to the boards and plexiglass was a very important issue that had not been considered in the 2004 Bernheim report and needed to be dealt with."

[45] The position of the Defendant on this motion is that the entirety of Mr. Bernheim's file should be before the jury. The following is from the Defendant's brief at page 7:

> The Defendant submits that if the Plaintiff intends to rely on the 2006 reports of Steve Bernheim, then his entire file must be entered as an exhibit by the Plaintiff, subject to any documentation that both the Plaintiff and Defendant agree are unnecessary. To do otherwise is not only inconsistent with the normal practice for entering exhibits, but would also confuse the jury.
>
> In the Defendant's submission, the Plaintiffs proposal is essentially that the she be permitted to select only favourable portions of Mr. Bernheim's file and present these as an exhibit to the jury in the form of a "dossier" or "brochure", leaving the Defendant to enter the remainder as exhibits and present them to the jury during cross examination.
>
> …
>
> It is the Defendant's submission Mr. Bernheim's file is a single unit and must be entered as an exhibit as such, regardless of what portions the Plaintiff wishes to rely on, and which parts she wishes to disregard.

[46] A review of all materials and submissions on this motion suggest that parties are arguing this motion from different places. This was an unnecessary motion and it is unfortunate that counsel could not "stick handle" their way through it. In light of this conclusion, I will respond to the four points that the Plaintiff raised at pages 4/5 of their brief and the one point raised by the Defendant. I will set forth the requests individually and then provide my response.

Defendant's Requests:

> Making sure that there are no typos in the Bernheim Expert Brochure that goes to the jury. We understand there is one typo in the index referring to the wrong year in the Brochure that is filed with the Court. We wish to amend that error with the leave of the Court;

Typos occur regularly in submissions and reports and they are corrected by reference. No action is therefore required at this time.

> The order of the documents in the Expert Brochure which was used on discovery which we intend to rely on at trial are not in the proper order in relation to Marsh Adjustment Bureau materials and we ask leave to amend same;

The Court has no difficulty permitting the Plaintiff putting the Marsh Adjustment Bureau materials in what they consider the proper order, regardless how that evidence comes before the Court.

> All the correspondence from Marsh Adjustment Bureau should be included with those reports and details to explain what is attached. Mr. Ritch already has copies of that correspondence and we ask leave to add these letters and attachments;

The parties possess this file. The experts reference the contents in their reports. It is obvious they will reference the contents to the jury. There is nothing new here. I will permit the Plaintiff to attach the materials attached as Schedule "C" to Mr. Proudfoot's affidavit of August 3, 2010, to their expert brochure.

> Since the 2004 Bernheim report has now been superseded by the July 6, 2006 report which is essentially the same report with an add-on to the 2004 report, we would ask that the 2004 report be deleted from the Expert Brochure that goes to the jury.

[47] I see no purpose in deleting the 2004 report from the Brochure. It will, no doubt, come before the jury during this trial.

Plaintiff's Requests:

[48] If Mr. Bernheim's file is to be an exhibit, then the entirety of the file will be presented. This is subject to the parties agreeing that certain file contents are not required for trial.

J.