IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Ursich* v. *Wilson*, 2004 YKSC 77

Date: 20041203
Docket No.: S.C. No. 00-A0280
Registry: Whitehorse

Between:

AMBER URSICH

Plaintiff

And

CHERYL LEE WILSON

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
Daniel S. Shier — For the Plaintiff
Tamera Golinsky and Richard A. Buchan — For the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff claims that the defendant is liable for a motor vehicle accident that occurred on April 7, 2000. The defendant has applied for an order requiring the plaintiff to disclose details of the settlement reached in a separate action, based upon an earlier motor vehicle accident involving different defendants. The issue is whether the settlement details sought (the amount and apportionment) are privileged and therefore not subject to disclosure.

ANALYSIS

[2] The case of *British Columbia Children's Hospital* v. *Air Products Canada Ltd.*, 2003 BCCA 177, is most helpful and persuasive, although it is not technically binding on this Court. I will refer to some of the passages from that case momentarily.

[3] The cases filed by the defendant all pre-date *British Columbia Children's Hospital*. One of those cases, *Anderson* v. *Gilman*, 2001 BCSC 1822, seems to have relied on the decision from the British Columbia Court of Appeal in *Derco Industries* v. *A.R. Grimwood*, [1984] B.C.J. No. 1979, which has since been effectively overturned by *Middelkamp* v. *Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.) and also by *British Columbia Children's Hospital*. So *Anderson* is of limited utility.

[4] Another of the defendant's cases, *Pete* v. *Lanouette*, 2002 BCSC 75, referred to *Middelkamp*, but before *Middelkamp* was considered by the British Columbia Court of Appeal in *British Columbia Children's Hospital*. Therefore, I find that it is distinguishable for that reason.

[5] The remaining case, filed by the defendant, *Murray* v. *Hough*, 2002 BCSC 339, in turn seemed to rely on the *Pete* case and did not really expand significantly on the reasoning on this issue.

[6] In *British Columbia Children's Hospital* case, Huddart J.A., in dissent, said at paragraph 72, that these cases often involve the "balancing of two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation".

Huddart J.A. then went on to say at paragraph 75:

> … It is undoubtedly a truism that a settlement agreement with one defendant may always be relevant to issues raised by the pleadings of a remaining defendant. As Hamilton J. remarked in Hudson Bay Mining, supra, at p. 632, "[t]here is no way of knowing until it is disclosed. …

Huddart J.A. also talked about the risk of one party being an opportunistic "free rider" of a settlement agreement, at paragraph 78, but acknowledged the other party may:

> … see an improved ability to "make an informed analysis of their settlement options by being able to more accurately calculate their exposure in litigation, taking into account [inter alia] the amount of damages for which the plaintiff has already been compensated." …

[7] That is what I understand the defendant's position to be in this case. She feels it is important to know the amount of the damages settled upon in the first accident and, if possible, how those damages were apportioned amongst the various heads of damages.

[8] However, that has to be balanced against the concern about privilege and the public interest in protecting of the result of negotiations.

[9] It is interesting to note for what it is worth, that in *British Columbia Children's Hospital*, the trial judge found that the amount of the settlement was not relevant and would not be disclosed. And, as I understand the decision, that conclusion was supported by the majority.

[10] There is also reference by the majority to Lord Griffiths' judgment in *Rush & Tompkins Ltd.* v. *Greater London Council*, [1988] 3 All E.R. 737 (H.L.(E.)), at paragraph 23 of the *British Columbia Children's Hospital* case. In part the quote reads:

> … In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one abdurant litigant. …

[11] I appreciate here that all the defendant is seeking is the amount of the settlement and the apportionment of it, but I found those comments instructive nevertheless.

[12] At paragraph 32 of the *British Columbia Children's Hospital*, Hall J.A., for the majority, considered the judgment of Chief Justice McEachern in *Middelkamp* as support for the proposition that all settlement documents should have a blanket privilege from production. Hall J.A., after noting both the judgments of Chief Justice McEachern and Justice Locke in *Middelkamp* said:

> … I consider both judgments militate against any order for production of the settlement agreement in the present case. It must be remembered that a five person court was convened in *Middelkamp* to consider the correctness of earlier cases including *Derco*. That panel overruled *Derco* and it is therefore no longer an authority in this jurisdiction. Hamilton J. in *Hudson Bay* and Lowry J. in *Belitchev* appear to have treated it as an applicable precedent but I do not consider that is a correct view.

[13] And lastly on this point, I note the reference in *British Columbia Children's Hospital* to the judgment of Lord Pill in *Gnitrow Ltd.* v. *Cape Plc.*, [2000] E.W.J. No. 3985, which was cited by Huddart J.A. at paragraph 80:

> … It could be a severe disincentive to negotiations generally if, by declining to negotiate, a party can routinely claim the advantage of knowing what other parties have agreed before condescending to negotiate for himself.

[14] Now the defendant says that she requires the information about the settlement in the first accident in order to properly apply the principles in *Long* v. *Thiessen*, *etc*. (1968), 65 W.W.R. 577 (B.C.C.A.), set out at page 591 of the majority judgment:

> Because the injuries inflicted in the second accident were superimposed upon the then residual effects of the injuries inflicted in the first accident, it is a matter of the greatest difficulty to determine what damages should be awarded for each set of injuries. The plaintiff should not receive more in respect of the first accident than he would if the second had not occurred; nor should he receive less because it did occur.
>
> Upon whom should the burden resulting from the difficulty of assessing damages fall? I think that is should fall on the defendant who caused the second accident, Laliberte. When he "found" the plaintiff, the plaintiff had a cause of action against the Thiessens; if Laliberte made the proof of the plaintiff's damages resulting from the first accident more difficult, Laliberte should make good any loss thereby resulting to the plaintiff. At the same time, the plaintiff should not be compensated twice for any injuries that are hard to segregate. I think that the way in which justice can best be done here is: (a) To assess as best one can what the plaintiff would have recovered against the Thiessens had his action against them been tried on April 22, 1966 (the day before the second accident), and to award damages accordingly; (b) To assess global damages as of the date of the trial in respect of the both accidents; and (c) To deduct the amount under (a) from the amount under (b) and award damages against Laliberte in the amount of the difference. …

[15] The defendant says that she is prejudiced by not knowing the amount of the settlement and that this knowledge is relevant to the process suggested in *Long* v. *Thiessen*. The difficulty I have with that submission is that throughout these cases, and in particular, *British Columbia Children's Hospital*, settlements are referred to as compromises. As both counsel submitted, there are many different factors and motivations that go into achieving a settlement. Often, settlements are simply global, with no breakdown as to the various heads of damage. And, being compromises, they

are the result of a variety of ultimately unknown motivations. The rationale for any given settlement is largely subjective in nature and depends upon what the parties respectively felt was fair and reasonable.

[16] Therefore, I accept the view of counsel for the plaintiff that the probative value of knowing a global amount of a settlement, or even knowing how a settlement is broken down amongst various heads of damages, is questionable. I am not persuaded that knowledge of the amount or amounts sheds any light on the subjective reasons for settling a previous matter. Thus, it would not assist in determining what the plaintiff would have recovered against the earlier defendants had the matter “been tried” the day before the second accident, as suggested in *Long* v. *Thiessen*. Rather, the onus is on the defendant to make that determination *as best she can* and deduct that amount from the global damages suggested for the current matter.

CONCLUSION

[17] I find the settlement details are privileged and therefore not subject to disclosure. I dismiss the defendant’s application. Costs will be in the cause.

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GOWER J.