CITATION: Harbottle v. Morrison, 2022 ONSC 2388
COURT FILE NO.: 18-1245 (Barrie)
DATE: 20220426

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: NICOLE HARBOTTLE, Plaintiff/Respondent

AND:

GLENN MORRISON and MICHELLE MORRISON, Defendants/ Moving Parties

BEFORE: The Honourable J. Dawe

COUNSEL: Sherilyn J. Pickering, Counsel, for the Plaintiff/Respondent

Michael Dunk, Counsel, for the Defendants/Moving Parties

HEARD: April 12, 2022 (by Zoom videoconference)

ENDORSEMENT

[1] The defendants in this motor vehicle accident tort action move for orders compelling the plaintiff to produce certain materials in response to requests that her counsel took under advisement during her examination for discovery, and ultimately refused. They also seek orders directing a third party to produce documents.

[2] The issues in dispute between the parties have been narrowed, leaving only two related refusals still in dispute. The defendants have also narrowed their requests for production from third parties, leaving only one such request to be addressed.

I. Refusals and undertakings

A. Issues no longer in dispute

[3] I will start by briefly addressing the issues that are no longer in dispute.

[4] Most significantly, in their motion materials the defendants took issue with the plaintiff's refusal to provide them with access to her private Instagram account. Mr. Dunk explained at the hearing that the defendants were specifically interested in photographs Ms. Harbottle had posted of herself, which to the extent that they show her participating in physical activities may be relevant to the disputed issue of her capabilities before and after the motor vehicle accident.

[5] However, after discussing the issue between themselves counsel advised that they had agreed on a process wherein the plaintiff's counsel will review the photographs at issue and provide copies to counsel for the defendants of those she agrees are relevant, and

descriptions of any that she considers irrelevant. In view of this agreement Mr. Dunk withdrew his request that I order the plaintiff to give the defendants access to her Instagram account.

[6] The defendants had also sought an order that the plaintiff fulfill two other partially fulfilled undertakings. The first related to a request for documents from Medaille College, which the plaintiff had applied to but never actually attended. Counsel for the plaintiff acknowledges that through an oversight these documents were only requested recently, and advises that she is prepared to write a follow-up letter to the College if they have not been received within thirty days.

[7] The second undertaking arose out of a request for the plaintiff's employment file from a company called Global Wise. Global Wise had responded to the plaintiff's counsel's request for her file by sending some documents, but the defendants counsel are not satisfied that what has been produced is the complete file. Ms. Pickering advised that she is prepared to write a follow-up letter to Global Wise.

[8] Mr. Dunk advised that he is satisfied with Ms. Pickering's commitments relating to these two requests, and withdrew his request for an order compelling the plaintiff to take further action to satisfy these undertakings.

B. The CIBC and Desjardins employment files

[9] I will now turn to the two refusals that remain in dispute.

[10] By way of background, Ms. Harbottle's action arises out of an April 2017 motor vehicle accident. During her examination for discovery, counsel for the defendants requested that she produce her employment file from the Canadian Imperial Bank of Commerce, where she apparently worked from 1996-2000, and from the Desjardins Group, where she apparently worked from 2000 to November 2014.

[11] The plaintiff's counsel has requested Ms. Harbottle's Desjardins employment records from April 2014 onwards – that is, for the time frame within three years before the date of the accident in April 2017. However, they have refused to request or produce her employment file from CIBC or from Desjardins before April 2014, on the grounds that Ms. Harbottle's work history before April 2014 is not relevant to the issue of her damages suffered in the accident three years later.

[12] The defendants argue that these documents are relevant because Ms. Harbottle is claiming damages for future income loss and has framed her pleadings very broadly, alleging that because of the April 2017 accident her:

> … ability to perform various tasks in the workplace has been markedly reduced, her employment opportunities are greatly limited and her competitive position in the labour market is substantially compromised.

[13] I agree that a plaintiff's employment history more than three years before an accident can sometimes be relevant to a claim for future lost income. As Doherty J.A. noted in *R. v. L.S.*, 2017 ONCA 685 at para. 89:

> Evidence does not have to establish or refute a fact in issue to be relevant; it need only, as a matter of common sense and human experience, have some tendency to make the existence or non-existence of that material fact more or less likely. There is a big difference between evidence that is relevant and evidence that is determinative.

[14] In tort cases where there is a dispute over what the plaintiff's future income would likely have been but for the accident, the inferences that can reasonably be drawn from the plaintiff's pre-accident work history will tend to become weaker the farther back in time one goes. However, in some circumstances even a very dated employment history can be relevant.

[15] For example, in *Papamichalopoulos v. Greenwood*, 2018 ONSC 2743, Master Abrams ordered the plaintiff to disclose his employment records going back thirteen years. However, she explained that this was necessary because of the particular details of his work history. The plaintiff had been earning a six-figure salary at the time of the accident, but had been terminated from this job after only four weeks. He attributed the loss of this job to his injuries. He had then obtained another job from which he was terminated after less than a year, which he attributed to his need to take time off to recover from surgery that was related to the the accident. Master Abrams explained (at paras. 4-6, italics in original):

> In the 13 years prior to his appointment with KIK [his employer at the time of the accident], the plaintiff was employed by six employers. This information is derived from his resume. It seems that he has not held any position for longer than about four years.
>
> The defendant is entitled to test the assumption, proffered by the plaintiff, that, *but for the plaintiff's alleged injury*, the plaintiff would have continued earning a six-figure salary and that the loss of his employment at KIK and NCH [his post-accident employer] is attributable wholly or in part to his injury. To use the words of defendant's counsel, the employment records and income tax returns sought will either support or undermine the plaintiff's expert's assumptions by identifying "whether the six-figure salary he was briefly earning at KIK was representative of the plaintiff's earning capacity overall, and was not a statistical outlier; and, whether factors personal to the plaintiff <u>other than</u> the fact of his alleged injury stood to interrupt his continued employment at KIK". Income tax returns will contextualize the salary earned by the plaintiff at KIK.
>
> While I recognize the broad temporal scope of what is being sought, it is here appropriate as it relates to the employment records. The retrospective look is to the period of employment first listed in the plaintiff's resume. It is necessary that the plaintiff's employment be looked at through the lens of

> what the plaintiff, himself, defines as his relevant work history. Had the plaintiff held fewer jobs for longer, the temporal scope might have been shorter.

[16] The problem the defendants face in the case at bar is that they have provided virtually no information about Ms. Harbottle's particular circumstances that would support the inference that her dated CIBC and Desjardins employment records are relevant to her future lost income claim.

[17] Ms. Harbottle appears to have held several different jobs since leaving Desjardins in November 2014, working at different times for a French-language Catholic school board; for a company named Global Wise, as noted above; and for a real estate developer, as I will discuss further later in these reasons. This last job seems to have been part-time, and Ms. Harbottle appears to have been working at it when she had her April 2017 accident. However, it is unclear from the record whether it was the only job she held at the time.

[18] Some details have been provided about the nature Ms. Harbottle's employment with the real estate developer, which involved working in sales and staging homes for showings. However, the evidential record contains very little information about the rest of Ms. Harbottle's work history.

[19] I do not know what type of work she did at any of her other past jobs, including her prior employment with CIBC and Desjardins. I do not know how long she held any of her more recent jobs with Global Wise and the school board, in what order she held these jobs, the nature of the work she did, or whether she has had any other employment since November 2014. I also do not know whether Ms. Harbottle is currently working and, if so, where she now works or what type of work she now does.

[20] I have also been given very little specific information about the details of Ms. Harbottle's alleged injuries or how she claims they are likely to affect her future employability and income. Her pleadings are framed broadly and almost generically, stating:

> As a result of the collision, the Plaintiff has sustained serious and permanent personal injuries, including but not limited to, traumatic brain injury, post- concussive disorder, injury to the neck, back and shoulders, vertigo, nausea, headaches, insomnia, anxiety, depression, and other psychological conditions, as well as a general tearing and straining of muscles and ligaments throughout the body.

[21] However, the record provides no information about which of these physical and mental conditions Ms. Harbottle says still affect her now, five years after her accident.

[22] As the moving parties, the defendants bear the burden of demonstrating that Ms. Harbottle's employment records from CIBC and Desjardins are relevant to a material issue in the action. I am not satisfied that they have met this burden on the very sparse evidential record they have presented. On the material before me, I cannot identify how either Ms. Harbottle's very dated employment history with CIBC, or her more recent but still dated employment history with Desjardins, are likely to support any chain of reasoning that

makes her prediction that she will suffer future income loss because of her injuries in the accident either any more or less probable.

[23] Accordingly, I am not prepared to order that Ms. Harbottle obtain these employment records and provide them to the defendants.

II. Third party production

[24] In their motion materials the defendants sought Rule 30.10 production orders against three different non-parties. However, at the hearing Mr. Dunk advised that the defendants are no longer pursuing their request to have the École Élémentaire Catholique Ste-Croix produce Ms. Harbottle's employment records, having already received her records from the associated school board.

[25] After the hearing, counsel then wrote to advise that the defendants are also withdrawing their request for a Rule 30.10 order against Dr. Santos Rijo.

[26] This leaves only one third-party production request still outstanding.

[27] The plaintiff takes no position with respect to this request, and the third party did not appear at the hearing or file any materials, despite both being properly served. I must nevertheless consider whether the order sought is justified in all the circumstances, after considering the relevant factors identified by the Ontario Court of Appeal in *Ontario (Attorney General) v. Stavro*, 1995 CanLII 3509 (Ont. C.A.)

[28] The remaining production request is directed at a realtor, Sutton Group Incentive Realty Inc., Brokerage ("Sutton Group Incentive").

[29] A real estate broker associated with this company named Norm Franks sent an email to the plaintiff's counsel in December 2019 in which he explained that he was hired by the builder of a housing development called Kingsmere Village to handle sales. He had in turn arranged for Ms. Harbottle to be hired by the builder to also work in sales and to handle home staging. This seems to have been a part time job for her. Ms. Harbottle appears to have been working at this job at the time of the accident, since Mr. Franks referred in his email to her having an accident "after staging one of my listings" and then needing time off to recover.

[30] Mr. Franks also explained in his email that Ms. Harbottle was paid on commission by the builder but added that she also received hourly wages "on a weekly basis towards future commissions". He stated further that "[u]pon request I can provide the details of payments" that he made to her himself.

[31] The plaintiff's counsel sent several follow-up letters to Mr. Franks requesting details of these latter payments, as well as any documentation he had about payments that Ms. Harbottle received directly from the builder. Mr. Franks apparently has not responded to any of these requests.

[32] I am satisfied that the information the defendants seek from Sutton Group Incentive is relevant to a material issue in the action, namely, Ms. Harbottle's lost income claim. She seems to have been actively working at this job at the time of the April 2017 accident. According to Mr. Franks's email, she then missed work because of her injuries. Evidence showing what she was being paid and how much money she received before and after the accident will be relevant both to the question of how much time she had to take off because of her injuries, and the issue of how much this cost her in lost income. This evidence may also have some relevance to Ms. Harbottle's claim for damages for future loss of income.

[33] I am satisfied that it would not be fair to the defendants to have to proceed to trial without this relevant information. I am also satisfied that it would not be unduly burdensome to require Mr. Franks or Sutton Group Incentive to produce the information requested and the documents sought. Mr. Franks has already offered to provide details of the payments he himself made to Ms. Harbottle, and this information ought to be within his possession or control, and therefore presumably within the possession or control of Sutton Group Incentive, with whom he is affiliated.

[34] There is nothing in the materials before me to specifically suggest that Sutton Group Incentive is likely to have any documentation of the payments Ms. Harbottle received directly from the builder. However, the proposed order only requires the company to produce any such documents that are in its possession. If Sutton Group Incentive does not have these documents already, the order sought will not require it to go and search them out.

[35] The defendants could have requested these documents directly from the builder, and may ultimately have to do so if Sutton Group Incentive turns out not to have them in its possession. However, if Sutton Group Incentive does have the documents in its possession there is no reason to think that it will have any difficulty producing them.

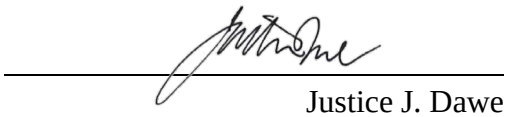
[36] Accordingly, I am prepared to order that Sutton Group Incentive provide the information and documents requested.

III. Disposition

[37] In the result, the defendants' motion is granted in part. Their request for an order directing Ms. Harbottle to obtain and disclose her employment records from CIBC and from Desjardins prior to April 2014 is dismissed. However, their request for an order requiring Sutton Group Incentive Realty Inc., Brokerage to produce the specified information and documents is granted.

[38] If the parties are unable to agree on costs of this motion, they may provide brief written submissions of no more than two pages in length, along with their bills of costs.

[39] Since the plaintiff was successful on the only remaining contested issues that required me to make a ruling, I would direct that she serve and file her submissions and bill of costs first, within two weeks of the date of release of this endorsement. The defendants will then have a further two weeks to provide their response. All materials may be served electronically and sent by email to my judicial assistant.



Justice J. Dawe

Date: April 26, 2022