Damaging Your Opponents Case At Trial Through Examinations For Discovery

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Examinations for Discovery in ICBC Claims are conducted for 2 primary reasons. The first is to learn about your opponents claim, the second, and perhaps equally important reason is to get admissions which can be used against your opponent should the claim proceed to trial.

When a damaging answer from an examination for discovery is read into evidence at trial it can have the same impact as if the damaging fact was testified to live in court. If a discovery answer contradicts evidence given at trial this can have an impact on credibility and can significantly effect the outcome of trial.

Rule 40(27) of the BC Supreme Court Rules addresses the use of discovery evidence at trial. This Rule, however, imposes certain limits on the abilities of opponents to use transcripts at trial. Specifically one limitation contained in the Rule states that the evidence is '*admissible only against the adverse party who was examined...*'

This limit should be kept in mind when suing multiple defendants and reasons for judgement were released today by the BC Supreme Court, Vancouver Registry, demonstrating this evidentiary limitation in an injury claim trial.

In today's case (MacEachern v. Rennie) the Plaintiff sued multiple parties for damages as a result of serious injuries. At trial the Plaintiff sought to read in portions of the Defendants examinations for discovery. The Plaintiff sought to have some of this evidence '*used not only against the party who was examined, but also against all the other defendants*'. Mr. Justice Ehrcke rejected this argument and followed the strict reading of Rule 40(27) limiting the use of the answers only against the defendants who gave them. The Court summarized and applied the law as follows:

[13] In any event it must be noted that the Rules of Court were amended in 1985 and again in 1992. The current form of Rule 40(27) is not the same as the rule upon which McEachern C.J.B.C. was commenting in Foote v. Royal Columbia Hospital. In 1982 there was nothing equivalent to the current Rule 40(27)(a).

[14] I find that the current law is correctly stated in Fraser and Horn, The Conduct of Civil Litigation in British Columbia, Vol. 1 looseleaf (Markham: LexisNexis Canada Inc., 2006) at paragraph 18.10:

An amendment to Rule 40(27)(a) in 1992 re-affirmed the long-standing jurisprudence that the testimony of a party on discovery was not admissible against his co-party. In 1986 the traditional rule had been held to have been superceded as a result of a rule amendment in 1985. Because of the 1992 amendment, it is once again the law that the evidence of one person on an examination for discovery is not ordinarily admissible against a co-party.

[15] Accordingly, the questions and answers from the examination for discovery of Mr. Rennie requested by the plaintiff and the additional questions 396 and 397, along with their answers, shall be read into evidence at trial, but they do not constitute direct evidence against any of the defendants except Mr. Rennie.

This decision serves as a good reminder that when ICBC Injury Claims are prepared for trial care should be taken to ensure there is admissible evidence against all of the Defendants for all matters in issue.