ICBC Claims And Proper Objections To Examination For Discovery Questions

December 21st, 2011

In one of the more in-depth judicial discussions of examinations for discovery in the context of a personal injury claims, reasons for judgement were released this week by the BC Supreme Court, Vancouver Registry, addressing the scope of proper objections at a Plaintiff's examination.

In today's case (Nwachukwu v. Ferreira) the Plaintiff was injured in a 2006 collision. In the course of the lawsuit the Plaintiff attended three examinations for discovery. The Plaintiff's lawyer raised numerous objections during these and the discoveries were ultimately cut short. The Defendant brought an application directing the Plaintiff to answer the questions which were objected to and further for permission to conduct a lengthier examination for discovery pursuant to Rule 7-2(3).

Mr. Justice Willcock granted the application finding there was "*significant obstruction*" at the previous discoveries. In doing so the Court provided the following helpful comments about the scope of discovery and of common objections:

[32] The scope of examination for discovery has recently been canvassed by this court in Kendall v. Sun Life Assurance Company of Canada, 2010 BCSC 1556; More Marine Ltd. v. Shearwater Marine Ltd., 2011 BCSC 166; and Day v. Hume, 2009 BCSC 587. In those cases, the court reiterated the following principles: the language of Rule 7-2(18) is identical to the former Rule 27(22) and the scope of examination for discovery has remained unchanged and is very broad. Rigid limitations rigidly applied can destroy the right to a proper examination for discovery. Useful or effective cross-examination would be impossible if counsel could only ask such questions as plainly revealed their purpose. An examination for discovery is in the nature of cross-examination. Counsel for the party being examined should not interfere except where it is clearly necessary to resolve ambiguity in a question or to prevent injustice.

[33] The time limit established by Rule 7-2(2) creates a greater obligation on counsel for the party being examined to avoid unduly objecting or interfering in a way that wastes the time available. A largely hands-off approach to examinations for discovery, except in the clearest of circumstances, is in accord with the object of the Rules of Court, particularly the newly stated object of proportionality. Allowing wide-ranging cross-examination on examination for discovery is far more cost effective than a practice that encourages objections which will undoubtedly result in subsequent chambers applications to require judges or masters to rule on the objections. It is far more efficient for counsel for the examinee to raise objections to the admissibility of evidence at trial rather than on examination for discovery. Where intervention is appropriate, the proper conduct of counsel is to state the objection to the form of a question and the reasons for the objection, but it is not appropriate to make comments, suggestions or criticism.

[34] Many of the specific objections in issue are addressed in an article by John Shields and Howard Shapray published in The Advocate, Vol. 68, pt. 5 (September 2010) at page 671, referred to by Mr. Markham-Zantvoort in argument.

(A) Relevance

[35] Counsel objects to many questions on the grounds that they are not relevant. In addressing these objections, I proceed from the proposition that counsel should have broad discretion to frame appropriate questions for the examination of the plaintiff, respecting the principles described in the cases to which I have referred.

(B) Confusion

[36] Counsel objects to many questions on the grounds that he finds them confusing. In Cominco Ltd. v. Westinghouse Canada Limited (1979), 11 B.C.L.R. 142 (C.A.), the Court of Appeal at para. 19 held:

If a question is difficult to answer, the witness can say so and can be cross-examined about the difficulty. It is for the witness, not counsel, to deal with that. Difficulty in answering does not exclude a whole area. It excludes specific questions. No area of fact is closed on the ground that to enter it would "open the floodgates".

(C) Repetition

[37] Counsel objects to questions he considers repetitive. As Shields and Shapray note, "asked and answered" is not an appropriate objection in Canada. Madam Justice Boyd in Rec Holdings Co. v. Peat Marwick Thorne Holdings, [1995] B.C.J. No. 1964 (S.C.), held at para. 9:

It is trite law that an examination for discovery is in the nature of a cross-examination. While there will be situations in which repeating the same allowable question over and over on cross-examination may amount to intimidation, the Court must be slow to interfere where that tactic is used relatively sparingly and particularly in circumstances in which there are good grounds for the cross-examiner's belief the witness may be falsifying his evidence.

(D) Inadequate Foundation

[38] Shields and Shapray say there is no requirement that a foundation be laid for a question. In Cominco, the court noted at para. 632:

The objection is that no foundation was laid for the questions. That suggestion does not appear to have been made at the time and I think that, if one objects, one should say why. Presuming that this objection can now be made, I merely say that I know of no requirement that a foundation be laid. None was cited to us. Those questions should have been answered by the witness without interruption by counsel.

(E) Compound Questions

[39] Counsel routinely objected to questions that he considered to be compounded questions. Shields and Shapray say, properly in my view, that objection to the form of question should be used sparingly.

(F) Privelege

[40] Counsel objected, at the most recent examination, when the plaintiff was asked what he alleges or says in relation to the claim. The plaintiff cannot be asked what counsel told him about his claim or how the case will be framed at trial. He may not be asked how much he will say he has lost, if the answer requires disclosure of an opinion obtained by the solicitor. Question 1152 on the examination for discovery seems to seek such information.

[41] The witness cannot be asked to disclose how the facts having assembled, weighed or analysed by counsel. That is what was offensive in the general requests considered by the court inTriathlon Ltd. v. Kirkpatrick, 2006 BCSC 890. The questions asked in that case were held to offend the description of the privilege afforded to the solicitor's brief in Hodgkinson v. Simms(1988), 33 B.C.L.R. (2d) 129 (C.A.). It was the manner of getting at the work product by asking what facts had been assembled by counsel or what facts would be relied upon, rather than by asking about specific facts, that was objectionable. The manner in which facts have been marshalled is a question going to trial strategy. It is for that reason that I expect that counsel have included in the book of authorities Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership, 2007 BCSC 143, although no express reference was made to it in oral submissions. In that case, questions were held to be objectionable because of what was being sought: conclusions reached by counsel, rather than the evidence of the witness.

[42] Questions that intrude upon privilege are generally objectionable. That is expressly reflected in Rule 7-2(18). Care should be taken to protect the solicitor/client relationship.