Settlement privilege: No backdoor to particulars of previous settlements

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A recent decision by the Ontario Superior Court of Justice confirms that settlement information arising out of prior actions remains privileged.

Issue and decision

In *Attree v Waye*, 2022 ONSC 4195 (*Attree*), the Court considered whether the plaintiff was required to disclose the particulars of a previous settlement to the defendant.

The plaintiff sought damages for a motor vehicle accident. Three years prior to the accident, the plaintiff was involved in a slip and fall and began a commercial host action. In both actions, the plaintiff allegedly sustained injuries to his right hip. The two actions were to be tried together or one immediately after the other, but the commercial host action settled. The defendant in the subsequent action sought to compel production of the particulars of the settlement of the commercial host action, and for the plaintiff to account for the manner in which he used the settlement funds.

The Court dismissed the motion, finding that the particulars of the settlement were privileged and the disclosure of how the plaintiff spent the settlement funds was also denied.

Analysis

Notwithstanding the fact that the two actions were to be tried together, and the plaintiff's similar damages alleged from the motor vehicle accident and the prior slip and fall, Justice Woodley ruled that the settlement information was still privileged.

Referring to decisions from, among others, the Alberta Court of King's Bench in *Milicevic v Jakubec*, 2005 ABQB 654, *Attree* reaffirmed the "well settled law" regarding settlement particulars of previous actions. The plaintiff's injuries should be assessed based on the evidence, and not by an assessment of the damages received in prior actions.

Justice Woodley also examined the “double recovery principle”, which holds that a plaintiff who suffered a loss should only recover to the extent of that loss and no further. The Court ultimately disagreed with the defendant’s argument that the settlement information should be disclosed in order to prevent double recovery.

The Court reiterated that the defendant was only liable for the injuries that they caused, and that the double recovery principle applies only to joint tortfeasors and not successive tortfeasors. Any previous injuries should be assessed based on the medical records and evidence and not by an assessment of the quantum of damages received in previous actions. As the defendant in *Attree* was a successive tortfeasor and not a joint tortfeasor, the settlement information remained privileged.

Attree discussed and confirmed the same principle outlined in *Anderson v Cara Operations Limited (Montana’s Cookhouse),* 2009 181 ACWS (3d) 885 (*Anderson*); the damages a plaintiff receives in a different action cannot be relevant to the damages which might be assessed against the defendants in the action at hand, as the defendants will only be responsible for the damages they caused. Similar to *Attree*, the plaintiff in *Anderson* was involved in a motor vehicle accident and a slip and fall.

As such, Justice Woodley found that the request for the plaintiff to account for the manner in which he used the settlement funds was unnecessary. Concerns about the plaintiff’s mitigation of his damages after the slip and fall could have been addressed by asking the plaintiff directly.

Key takeaways

- Where a plaintiff has multiple claims, the particulars of any settlements remain privileged, even in situations where the actions are to be tried together, or one after the other.
- While a plaintiff’s counsel may be obligated to disclose the pleadings and documents related to a prior claim, they do not need to disclose the particulars of any prior settlements.

For more information relating to disputes matters, please reach out to the key contacts listed below.

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