

*Philip v. Hillaire, [2022] O.J. No. 830*

Ontario Judgments

Ontario Superior Court of Justice

J. Stribopoulos J.

Heard: By videoconference.

Judgment: February 22, 2022.

File No.: CV-19-4587

**[2022] O.J. No. 830**

Between Manju Philip, and Rockim K.D. Hillaire

(17 paras.)

## **Counsel**

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Ms. M. Qiu, for the Plaintiff / Responding Party.

Mr. C. O'Reilly, for the Defendant / Moving Party.

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## **ENDORSEMENT**

**J. STRIBOPOULOS J.**

**1** The Defendant moves, under Rule 30.06 of the *Rules for Civil Procedure*, for an order compelling the Plaintiff and her husband, Abraham Philip, a third party to this action, to each serve a further and better affidavit of documents and to compel them to produce further documents.

**2** Although the third party, Mr. Philip, consents to the motion, the Plaintiff opposes it. She maintains that granting the motion would license what amounts to little more than an unsubstantiated fishing expedition by the Defendant.

**3** In this action, the Plaintiff claims against the Defendant for damages she alleges resulted from a motor vehicle accident that took place on November 20, 2017. The Plaintiff claims she was a passenger in the vehicle when it

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was struck by the Defendant's left-turning vehicle. In her Statement of Claim, amongst other things, the Plaintiff claims that because of the accident:

- \* She sustained "a partial thickness tear of the triceps tendon in her right shoulder, a right elbow injury and other soft tissue injuries" and has "suffered from headaches, neck pain, back pain, right shoulder pain, right elbow pain, wrist pain, numbness and tingling in her hands, sleep disturbance, memory issues, post-traumatic stress disorder, depression and anxiety": at para. 8.
- \* She sustained "a permanent serious impairment of an important physical, mental, or psychological function": at para. 9.
- \* She "has experienced significant pain and suffering and will continue to experience pain and suffering in future.": at para. 10.
- \* She "has been unable to work and sustained a loss of income and she will continue to lose income in future.": at para. 11.
- \* She "has been unable to participate in her usual activities of daily living to the same extent that she did before the accident.": at para. 12.

**4** Before the Plaintiff's examination for discovery, the Defendant downloaded images from the publicly accessible portion of the Plaintiff's husband's Facebook account. It contained photographs of the Plaintiff going on trips in 2019, including to Crystal Beach and Muskoka. At her examination for discovery, the Plaintiff was cross-examined about these photographs. The Plaintiff acknowledged the photographs depicted her and members of her family, and offered explanations for them that, if accepted, are consistent with the claims she makes in the action.

**5** In her affidavit of documents, sworn January 28, 2020, the Plaintiff has not listed any documents from her Facebook account.

**6** On this motion, the Defendant seeks an order to compel the Plaintiff to serve a further and better affidavit of documents, that lists all relevant documents (posts, photographs, videos, images, audio recordings, non-private messages, and textual and/or audiovisual media) from her Facebook account, and an order compelling her to produce a digital copy of such documents. The Defendant does not seek any private communications between the Plaintiff and any third parties that she may have sent or received through Facebook's private messaging service.

**7** The Plaintiff responds that the Defendant has failed to establish that what he seeks on the motion would be relevant to any issue in this action. The Plaintiff notes that the Defendant had an opportunity to cross-examine the Plaintiff concerning what might be contained within her Facebook account that is only accessible to her "friends" on Facebook and elected not to do so. Given that the Plaintiff explained the photographs from her husband's Facebook account in a way that does not make them at all inconsistent with the claims she advances in this action, the Plaintiff argues that the motion amounts to an unjustified fishing expedition.

**8** A party to an action is under a positive duty to disclose, "[e]very document relevant to any matter in issue in an action that is or has been" in that party's "possession" or "control": Rule 30.02 (1) (underlining added).

**9** Relevance is a relatively low bar. Something is relevant if, as a matter of logic and human experience, it bears upon some fact in issue in the litigation: see *R. v. J-L.J.*, [2000 SCC 51](#), [\[2000\] 2 S.C.R. 600](#), at pp. 622-623; *R. v. McDonald*, [2017 ONCA 568](#), [351 C.C.C. \(3d\) 486](#), at para. 66-67; *R. v. Watson (1996)*, [108 C.C.C. \(3d\) 310](#) (Ont. C.A.), at para. 33. As Doherty J. reminded in *R. v. L.S.*, [2017 ONCA 685](#), [40 C.R. \(7th\) 351](#), 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. ...

**10** With respect, the Plaintiff's position on this motion is prefaced on a misconception of what is necessary to show that evidence is relevant. In effect, the Plaintiff claims that because she can explain the photographs from her husband's Facebook account in a way that does not make them inconsistent with the claims she makes in this action, those photographs, and similar materials that are very likely contained on her own Facebook account, are not relevant. With respect, in taking that position, the Defendant overstates what is necessary to make a document relevant. The Plaintiff's position finds no support in the well-established jurisprudence from the Supreme Court of Canada and the Court of Appeal for Ontario that is binding on this court concerning the meaning of "relevance."

**11** In my view, the Defendant's motion does not constitute a fishing expedition. Based on the materials filed, which include photographs from the Plaintiff's husband's Facebook account and photographs from the publicly accessible portions of her Facebook account, I am satisfied there are likely documents contained within her Facebook account that are relevant to the claims she makes in this action. Especially her claim that because of the accident she "has been unable to participate in her usual activities of daily living to the same extent that she did before the accident." In other words, that there are likely documents within her Facebook account, documents that she possesses or controls, that are relevant to the material issues in this action.

**12** Given the Plaintiff's claims, anything that touches upon her quality of life, at least during the year preceding the accident, and in the years since the accident, is relevant. In other words, such "documents," as a matter of logic and human experience, will assist in shedding light on the veracity of the Plaintiff's claims in this action. Especially her claim that because of the accident she "has been unable to participate in her usual activities of daily living to the same extent that she did before the accident."

**13** In my view, that would include any posts or messages, not sent through Facebook's private messaging feature, that either expressly or implicitly furnish insight into the Plaintiff's physical condition or state of mind. In terms of photographs or videos posted to that area of her Facebook account accessible to her "friends," that would include

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anything that shows the Plaintiff going about "her usual activities of daily living," for example, cooking, cleaning, shopping, exercising, socializing, visiting with family or friends, and going on excursions or vacations.

**14** Whether the Plaintiff might be able to explain such "documents" in a way that, if her evidence is accepted, would not detract from her credibility, does not mean that the documents are irrelevant. Ultimately, it will be for the trier of fact to decide the weight to be placed on such documents or the Plaintiff's explanations for them. As the jurisprudence makes clear, evidence need not be determinative of a fact in issue to be relevant.

**15** Accordingly, the Defendant's motion is allowed. This court Orders:

- 1) That the Plaintiff, Manju Philip, deliver a further and better affidavit of documents which includes all relevant documents from her Facebook account from November 20, 2016, until the date of this order, within sixty (60) days from the date of this order. To be clear, the Plaintiff is not required to include any messages / texts that were sent through private messaging or direct messaging through her Facebook account;
- 2) That the Plaintiff download and produce to the Defendant a digital copy of all relevant documents from her Facebook account, from November 20, 2016, until the date of this order, including but not limited to any relevant posts, photographs, videos, images, audio recordings, public messages, and textual and/or audiovisual media, within sixty (60) days of the date of the order.

**16** With respect to the Defendant's motion concerning Mr. Philip's Facebook account, he consents to the order sought by the Defendant, and relief being granted as specified in paragraphs 3, 4 and 5 of the Notice of Motion. Accordingly, an order should issue, once drafted by counsel, as it concerns the relief sought against Mr. Philip, in accordance with those paragraphs.

**17** The Defendant, having been successful on this motion, is entitled to costs. The Plaintiff is ordered to pay the Defendant \$3,000 in costs, inclusive of disbursement and HST, within 30 days of today's date.

J. STRIBOPOULOS J.