Hypothetical Questions on Discovery

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When conducting an examination for discovery, counsel should keep in mind that the *Rules of Civil Procedure* are designed to provide parties with full disclosure of information in order to avoid surprise.

However, as demonstrated in *Beemer and Chrysler v. 1350246 Ontario Inc.*, 2020 ONSC 5564 ("*Beemer*"), there are limits on the scope of discovery. This case addresses a hypothetical question that was posed to the defendant's witness on discovery.

The Action

Beemer involved a personal injury action commenced by the plaintiff, David Beemer, and his wife, Lee Chrysler, resulting from an ATV accident that occurred on October 16, 2017. Mr. Beemer alleges that he was driving the ATV when the front left wheel came off the axle, causing him to lose control of the vehicle and sustain injuries.

Before the accident, the ATV was serviced by the defendants, 1350246 Ontario Inc., on September 28, 2017. The allegations of negligence against the defendants relate to a failure to properly service the ATV.

Refusal Motion

Justice Christie heard a motion brought by the plaintiffs for an answer to a question refused by the defendants during examination for discovery, as follows: "to advise that if the threads were on the axle, the only way for the tire to come off would be if the cotter pin wasn't in place."

The plaintiffs mainly relied on rule 31.06 (1) of the *Rules of Civil Procedure*, which provides that: "A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable…".

In support of the relevancy of the question, the plaintiffs provided a note that was part of a sworn document. The note was from Trevor Hoyle at Hoyles Speed Shop that stated:

> I have looked at Dave's side x side and I believe the cotter pin that holds the axle nut in place was not installed, as the threads on the axle are not damaged. If the nut falls off the hub assembly can come off causing the tire to fall off.

The defendants' position on the motion was that the question refused was to be decided by the Court with the assistance of expert opinion.

Relevant Case Authority

Justice Christie referred to *Reis v. CIBC Mortgages Inc.,* 2011 ONSC 2309, where the Court stated that a party, other than an expert, need not answer hypothetical questions.

Justice Christie also referred to *Bot Construction (Ontario) Ltd. v. Dumoulin*, 2010 ONSC 6569 ("*Bot*"), which involved an action that arose out of a highway construction project. The plaintiff alleged that the defendant was involved in a fraudulent scheme against the plaintiff.

In *Bot*, one of the questions refused at examination for discovery was whether the defendant understood that if the plaintiff had cause to terminate its relationship with the defendant, it would be entitled to do so. The defendant answered that this was a question of law that she as a lay person could not answer.

In concluding that the defendant did not need to answer the question, the Court stated:

> …The question in issue goes beyond clarifying what legal position Ms. Dumoulin is taking. The question requires Ms. Dumoulin, as a lay person, to give a legal opinion on a hypothetical matter of law. That question is not relevant. It is argumentative and is directed at eliciting a concession from Ms. Dumoulin based on Bot's theory of the facts with which she has expressly disagreed, rather than narrowing the issues.

The Outcome

Justice Christie characterized the question being asked by the plaintiffs as "one of stated opinion to which the Defendant representative must agree or disagree."

She pointed out that the representative of the defendants who testified at discovery held no trades in mechanics. He was not sought to be qualified as an expert in the field of

mechanics, and based on the information provided, would never have qualified. He also did not conduct any post-incident inspections of the subject ATV.

Justice Christie advised that the question asked of the defendant "sought an opinion in the field of mechanics, based on hypothetical facts. Beyond being hypothetical, the question is a matter of argument, upon which reasonable experts may disagree."

Justice Christie found that the question was properly refused

The Lesson Learned

On discovery, a party generally does not need to answer hypothetical questions. However, this is not absolute.

In *Motaharian (Litigation guardian of) v. Reid* [1989] O.J. No. 1947, the Court indicated:

> Hypothetical questions are not *per se* improper. They invariably seek an opinion, whether a general or specific one. They should be permitted where the witness has expertise, when relevant to some issue in the case, provided they are not overly broad or vague. Another proviso should be added: a witness need not defend other persons' actions or answer for their failures.

In *Inland Cement Ltd. v. Stantec Consulting Ltd.* [2002] A.J. No. 22 (QB), the plaintiff brought a professional negligence action against an engineer. The issue was whether the defendant's services were performed in a competent and professional manner. The defendant refused to answer on discovery whether they would have acted differently if they had known the soil conditions at the time of construction.

This hypothetical question was found to be proper as it went to the defendant's professional or technical expertise which was in issue.

However, questions that go to the ultimate issue or ask a defendant to opine on the standard of care are outside the scope of a defendant's expertise. Such questions are properly the domain of the trier of fact: *Stryland v. Yazadanfar*, 2011 ONSC 3842.

Moreover, as indicated in *Beemer*, questions that are a matter of argument upon which reasonable experts may disagree may be inappropriate.

In summary, if a witness on discovery has expertise in the subject matter of the dispute, he or she <u>may</u> be required to answer hypothetical questions. Before asking a hypothetical

question on discovery, counsel should establish that the witness has the requisite expertise to answer the question.