IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20140614
Docket: M104775
Registry: Vancouver

Between:

Sharon Beggs

Plaintiff

And

Shamus David Stone and Scotia Dealer Advantage Inc.

Defendants

Before: The Honourable Mr. Justice Smith

Oral Reasons for Judgment

Counsel for the Plaintiff:	J.J. Locke M.J. Gismondi
Counsel for the Defendants:	D. Cheifetz
Place and Dates of Trial:	Vancouver, B.C. May 26-30, June 2 & 3, 2014
Place and Date of Judgment:	Vancouver, B.C. June 4, 2014

[1] The plaintiff, Sharon Beggs, was injured in a motor vehicle accident on July 18, 2009. She suffered significant soft tissue and psychological injuries. Liability for the accident has been admitted. The major issue in the assessment of damages is whether the plaintiff would have become disabled in any event due to a variety of pre-existing conditions.

[2] At the time of the accident the plaintiff was a front seat passenger in a minivan driven by her husband, Ernest Beggs. They stopped behind a police vehicle that had stopped in front of them. Their van was then struck from the rear, apparently at high speed, by the defendant's vehicle. The impact was sufficient to push the Beggs' vehicle into the oncoming traffic lanes and to break the plaintiff's seat. She said she found herself lying flat on the seat as if she was on a bed while she was being showered with glass from the breaking of the van's rear window. She had to be helped out of the van by emergency personnel. The vehicle was written off as a total loss.

[3] The plaintiff was taken to Eagle Ridge Hospital by ambulance but released later that day. The following day she was stiff and sore in the neck and down the right side. She saw her family doctor a few days later, had a number of massage therapy sessions over the summer and was eventually referred to Dr. Stewart, a specialist in physical and medical rehabilitation who saw her for the first time on September 22, 2009.

[4] Dr. Stewart at the time was of the opinion that the plaintiff had sustained soft tissue injuries to her neck, back and right knee. She recommended physiotherapy as well as counselling for post-traumatic stress symptoms, anxiety and depression that the plaintiff was reporting from what I find was clearly a very frightening accident.

[5] Over the next several months the plaintiff continued to see Dr. Stewart with complaints of pain and stiffness in her neck, back, right shoulder, and arm as well as headaches, and pain in her right hip and knee. Dr. Stewart prescribed a cane, which the plaintiff still uses. During that time the plaintiff was also attending psychological counselling. According to Dr. Stewart, there had been little improvement in the

plaintiff's physical symptoms by one year after the accident when the plaintiff moved to Winnipeg.

[6] Dr. Stewart next saw the plaintiff in November 2012, after the plaintiff had moved back to British Columbia, and found considerable improvement in her physical symptoms. She agreed that the results of her examination were very similar to what was found by Dr. Arthur, an orthopedic surgeon who had examined the plaintiff at the request of the defendant in August 2011 Dr. Arthur found that her soft tissue injuries had largely resolved by that time.

[7] However, the plaintiff testified her neck and arm still bother her. She uses what she calls a heat bandage on it and says the pain can be “really bad one day, so-so at other times.”

[8] She says she has some better days than others. She complains of continuing pain in her knee and hip when she tries to walk and finds she has sometimes fallen when her knee gave out.

[9] Of greater significance is the psychological and emotional impact of the injuries. She has nightmares and sleep disturbance. She was afraid to drive for about two years after the accident, and even now only drives short distances on rare occasions. She says she is a very nervous and fearful passenger when riding in a car. She is constantly worried about other cars being too close to their vehicle.

[10] She also says she panics when she is around people, but on the other hand cannot be left by herself and is afraid of being alone. She says she has difficulty with memory and concentration and is constantly using sleeping pills with a somewhat limited effect.

[11] The plaintiff was assessed by a psychologist, Dr. Peter Joy, who says the plaintiff has chronic pain, although not a diagnosable pain disorder. He says there is a post-traumatic stress disorder, which is now in partial remission, together with a major depressive disorder. There is a previous history of depression, but Dr. Joy believes that this was worsened by the accident.

[12] In the circumstances I find that the onset of a post-traumatic stress disorder is quite understandable given the very frightening circumstances of the motor vehicle accident, which was far more dramatic than the normal rear-end collision.

[13] Dr. Armstrong, a chronic pain specialist, says the plaintiff suffers from fibromyalgia manifesting in generalized chronic pain. He says the plaintiff may have had minor or latent fibromyalgia before the accident but the accident greatly worsened her condition.

[14] Dr. Stewart does not agree with Dr. Armstrong's diagnosis of fibromyalgia, saying that is a controversial diagnosis that she has never made. Notwithstanding their disagreement over the precise medical cause, Dr. Joy, Dr. Armstrong and Dr. Stewart all agree that the plaintiff's combination of physical and psychological conditions are disabling and likely to remain so.

[15] At the time of the accident the plaintiff was 52 years old. She and her husband were resident caretakers of a large apartment complex. She spent about four hours a day doing administrative office work, and the balance of the day in more physical tasks, such as cleaning. Although her husband did the most physical work, she spent a large part of each day walking in and around the three buildings that made up the apartment complex.

[16] In the months preceding the accident, she had taken on an increased burden because her husband suffered a stroke in January 2009. By the time of the accident he had not fully resumed all of his previous duties. The plaintiff attempted to return to work in the fall of 2009 but was not successful and has not worked since October 2009. Dr. Joy, Dr. Armstrong and Dr. Stewart all agree she is not capable of returning to her former work.

[17] In that regard, the evidence suggests and I find that she would, by two years after the accident, have been physically capable of resuming at least some of her work duties, albeit with some pain and discomfort, but that was rendered impossible by the aggravating and confounding effect of the psychological problems.

[18] All of the evidence supports a finding that Ms. Beggs is presently disabled by a combination of physical injuries and psychological difficulties. This has had a devastating effect on her quality of life. While she was not particularly active before the accident, she now does virtually no physical activity, has ongoing stiffness and walks with a cane. She still experiences anxiety and depression as well as sleep difficulties and has abandoned most of her former social activities.

[19] Since the accident she has experienced additional stresses, including the death of her father-in-law, which apparently contributed to a cardiomyopathy that had been diagnosed. The plaintiff has a history of a variety of health problems, including episodes of depression, panic attacks, respiratory difficulties, high blood pressure, low back pain and injuries suffered in previous motor vehicle accidents.

[20] Shortly before the accident she was reporting leg pain to her family doctor. She said she has always had a lot of stress in her life but was previously able to "block things out," which she finds she is no longer able to do.

[21] Despite her pre-existing problems, the plaintiff remained functioning and employed up to the date of the accident. There is no evidence that any of her previous problems were disabling or that they were progressing and there is no medical evidence that any of them would necessarily have done so. In specific regard to the history of depression, although this was diagnosed by her family doctor, she never had any treatment for it, and I accept the evidence of the medical experts, particularly Dr. Joy, that the depressive condition was likely worsened by the accident and the superimposed post-traumatic stress disorder.

[22] Counsel for the defence seeks an adverse inference from the plaintiff's failure to call the family physician who treated her before and in the year following the accident and more particularly the psychologists who treated her both here and in Winnipeg after the accident. The factors for drawing an adverse inference are set out in *Buksh v. Miles*, 2008 BCCA 318, at para. 35. These include the evidence before the court, the explanations for not calling the witness, the nature of the

evidence that could be provided, the extent of disclosure of the witness's clinical notes and the circumstances of the trial.

[23] In declining to draw an adverse inference, I place particular emphasis on the fact that the clinical records of all of these professionals were disclosed to defence counsel and were reviewed by all the experts who gave their opinions in part based upon those records. The plaintiff's pre-accident condition and post-accident progress are well documented, and there is nothing to suggest that there is anything in those records that contradicts anything that the doctors who have testified have stated.

[24] The defendant also argues that the plaintiff failed to mitigate her loss by not continuing with her treatment and in particular her psychological treatment. That would be a valid consideration if the plaintiff had refused to treatment completely, but she in fact had extensive treatment in the two years following the accident. Dr. Joy says he agrees with the plaintiff's decision to not see no more psychologists because it is unlikely that any benefit would be gained from further treatment at this point. I accept that evidence.

[25] In dealing with the plaintiff's pre-existing conditions, I must first of all recognize the basic principle that the defendant need not put the plaintiff in a better position than she would have been but for the accident and should not compensate the plaintiff for any damages she would have suffered anyway.

[26] On the other hand, the defendant takes the victim as he finds her, and is liable for injuries caused by his negligence even if those injuries are unexpectedly severe owing to a pre-existing condition. These somewhat different principles are often characterized as a question of the crumbling skull versus the thin skull. In either case, the plaintiff must establish that the defendant's negligence caused or materially contributed to the injuries.

[27] In this case, the picture is that of a person who had multiple long standing physical and psychological problems but was managing to cope with them, perhaps only just coping. I find the accident was a final blow that she could not cope with or

recover from and in that sense, she was a classic thin skull. There is no doubt that the accident caused or contributed to her current condition.

[28] The plaintiff seeks non-pecuniary damages of $90,000. The defendant says an award would be appropriate in the $50,000 to $70,000 range. In assessing non-pecuniary damages, each case must be decided on its own facts having regard to the factors set out in *Stapley v. Hejslet,* 2006 BCCA 34.

[29] However, to the extent previous cases involve similar facts, they can be a useful guide to an assessment. Of the cases that have been cited to me, I find the most relevant to be *Testa v. Mallison*, 2009 BCSC 957; and *Delgiglio v. Becker*, 2012 BCSC 480. Both those cases involved plaintiffs of similar age to this plaintiff with a complicated history of pre-existing conditions and accidents that caused physical as well as psychological injuries or physical injuries and psychological problems, although the psychological problems appear to be somewhat less severe than was the case with this plaintiff.

[30] In this case the combination of physical and psychological injuries are likely to have a severe and permanent impact on the plaintiff's life, including her quality of life in retirement. Taking all the factors into account, I assess non-pecuniary damages as $80,000.

[31] The plaintiff has been unable to work since shortly after the accident. The medical and psychological evidence is that the combination of her injuries will permanently disable her from that kind of work. Even Dr. Arthur, the expert witness called by the defence says:

> I have reviewed her job description regarding care taking, apartment complex, et cetera. I think she should be quite capable of the sedentary to light duties required but would have difficulty with the moderate and heavy duties. I would not state that her inability to perform these difficulties is completely related to the motor vehicle accident in question. As noted in her records she has multiple morbidities that predate the motor vehicle accident.

[32] In making that statement, Dr. Arthur does not consider the psychological issues which are referred to by Dr. Joy and Dr. Stewart, which increase her

disability. As I previously said, I find the plaintiff would likely have been capable of being back to work, perhaps with some assistance, by now, but for the psychological conditions which were also caused by the accident.

[33] As I also said previously, the plaintiff prior to the accident was coping with her pre-existing conditions, and there is no evidence that any of her previous conditions were deteriorating or that they would necessarily deteriorate to the point of becoming disabling. The question is whether but for the accident the plaintiff would have remained in her pre-accident job for an extended period of time. She and her husband had been hired as a couple because the size of the complex required two resident caretakers. They would not have been able to remain in that job or in the residence that the job provided if Mr. Beggs' stroke prevented him from returning to full duties at some point.

[34] Mr. Beggs was also injured in the accident and there is no evidence of what his prognosis was or would have been absent the accident. It is certainly possible that Mr. and Mrs. Beggs would have lost the position that they had and with it their home, but the evidence of Mr. Clark, the president of the company that employed them, and of Mr. Robinson, who is in the business of recruiting people for such positions, is that there are many positions available for single managers in smaller buildings and that experience is an important consideration for employers.

[35] I therefore find that but for the accident on the balance of probabilities, Ms. Beggs would have continued to be employed as a building manager up to the time of trial, either jointly with her husband in the complex they previously managed, or as a single manager in another property. Relying on Mr. Benning's calculations, including the value of the loss of the reduced rent that was a benefit of their position, I award damages for loss of past income of $128,000.

[36] The evidence is clear that the plaintiff will be unable to return to her previous occupation in the future. Her age and limited education make any kind of retraining unlikely, even if anyone could identify a job that she might be capable of doing with her combination of physical and psychological difficulties.

[37] But for the accident I find that the plaintiff would have continued working as long as she could if for no other reason than financial necessity. She has clearly lost the capacity to do that.

[38] Although there is no evidence that her pre-existing conditions would have become disabling at any particular time in the absence of the accident, it must be recognized that, individually or in combination, they presented a risk that would likely have become more significant as the plaintiff grew older. In assessing an award for loss of future earning capacity, that risk must be recognized with a significant deduction for contingencies.

[39] According to the calculations of the economist Mr. Benning, if the plaintiff worked to age 65, as I am sure she would have at least tried to do, the present value of her future income is $221,000. If she had only been able to work until age 60, the present value of her future income would be $85,000. Applying a 40 percent contingency deduction to the larger figure produces an intermediate number of $133,000. Recognizing that this is a matter of assessment, not precise calculation, and considering all of the risks and uncertainties, I award damages for loss of future earning capacity of $125,000.

[40] The only damages claimed for the cost of future care are the cost of a chronic pain clinic and a supervised weight loss program recommended by Dr. Armstrong. In view of Dr. Joy's evidence that further psychological treatment is unlikely to have any benefit and in view of the controversy as to whether her ongoing problems of chronic pain are related to physical or psychological factors, I am not satisfied that had the measures recommended by Dr. Armstrong would have a significant benefit, particularly in view of the plaintiff's stated reluctance to engage in further treatment. I therefore make no award for the cost of future care.

[41] I understand counsel have agreed or are close to agreement on special damages, and I will not address those. In summary I award non-pecuniary damages

of $80,000, past income loss of $128,000 and damages for loss of future earning capacity of $125,000 for a total award of $333,000.

"N. Smith, J."