
CANADA / JUDGMENT

Antoniali v. Massey

2008 BCSC 1085

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1085err1 Antoniali v. Massey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Antoniali v. Massey,

2008 BCSC 1085

Date: 20080811

Docket: M054869

Registry: Vancouver

Between:

Rita Antoniali

Plaintiff

And:

Katherine Massey, Doris Nielsen

and Silvano Bonato

Defendants

Before: The Honourable Mr. Justice Preston

Reasons for Judgment

Counsel for the Plaintiff

T. Brown

Counsel for the Defendants,

Massey and Nielsen

C. Dol

& R.J. Merlo

Date and Place of Trial:

March 3-7 and 10-14, 2008

Vancouver, B.C.

- [1] The plaintiff, Ms. Rita Antoniali, was injured in a motor vehicle collision on November 7, 2003. She was a passenger in a vehicle being driven by her father, the defendant Bonato, when it was struck from the rear by a vehicle owned by the defendant Nielsen and operated by the defendant Massey. Nielsen and Massey admit liability for the collision.
- [2] Ms. Antoniali suffered injuries to her back and neck. Her neck and back continue to trouble her at trial, some four years and five months after the collision.
- [3] The central issues in the case are the cause and extent of Ms. Antoniali's injuries, and her failure to mitigate their effects.
- [4] Ms. Antoniali was 33 years of age at the time of the collision. She was single. She had been employed since 1994 as a medical office assistant for Dr. M.K. Leung. She had pre-existing medical problems with both her neck and back and suffered periodically from depression. However, she was able to function very effectively in her job and had not missed a day of work in the nine years while she was employed by Dr. Leung. She testified that since the collision she has been unable to return to full-time work except for a short period after the collision.
- [5] She was married on June 19, 2004. She left her employment on maternity leave for approximately one year on April 4, 2006. She gave birth to a daughter on May 13, 2006 and returned to work in May of 2007. She worked only two days per week at first but, at trial, testified that she was now ready to resume working four days per week.
- [6] The defendants submit that Ms. Antoniali has failed to mitigate her loss by failing to hire and follow the direction of a personal trainer or to follow a regime of exercise recommended by her treating and consulting physicians. In addition, they contend that Ms. Antoniali suffered only a mild exacerbation of her pre-existing injuries; that much of the time she took off work was caused by her inability to arrange child care for her daughter; and that her injuries were greatly exacerbated when she went horseback riding on her honeymoon. The defendants submit that this intervening event is a separate cause of injury for which they are not liable.
- [7] The plaintiff formally abandoned any claim for psychological injury on the following terms:

I formally declare that the Plaintiff is not, nor will be, advancing a claim for anxiety and/or depression, nor any aggravation of any pre-existing emotional or psychological problems.

The trial proceeded on that basis.

- [8] It is clear that Ms. Antoniali is psychologically fragile and suffers from anxiety and depression. Her employer and family physician, Dr. Leung, testified that he treated Ms. Antoniali for anxiety and panic attacks both before and after the collision. He prescribed medication, counselling, and treated her with hypnotherapy. Ms. Antoniali was unable to continue testifying on a number of occasions during the trial. She is obviously a highly sensitive and anxious person. She is timid and fearful of engaging in activities outside her experience. This picture of Ms. Antoniali was borne out by her testimony during the trial, the medical evidence, and the evidence of the witnesses who knew her both before and after the collision.

Pre-existing Medical Problems

- [9] Ms. Antoniali had been involved in a previous motor vehicle accident in 1989 that caused injuries to her back and neck. These injuries continued to trouble her until the November 2003 collision. Although she was involved in another motor vehicle accident in 2001, I am satisfied that she did not suffer injury. She received treatment from Dr. Leung on a sporadic but relatively frequent basis for her pre-collision back and neck injuries. He had treated her nine times in 2003 before November. The symptoms of her back and neck problems from the earlier accident were similar to the symptoms stemming from this collision. However, I am satisfied that the November 2003 collision caused her substantial new injuries and that the effects of those injuries continued to trouble her at the time of trial.
- [10] I place much reliance on the testimony of her family physician, Dr. Leung. After the November collision, he observed a mild scoliosis in her spine which had not previously been present. Shortly after the collision, Dr. Leung referred Ms. Antoniali to physiotherapy. She attended bi-weekly on 12 occasions. Dr. Leung expected that she would continue to do the exercises taught to her by the physiotherapist. By July of 2004, she was bent over. She was using a cane by the mid-summer of 2004. It was clear that the magnitude of her disability had increased by the summer of 2004 to the point where she was unable to work or do many normal daily physical activities. In October, 2004, Dr. Leung referred Ms. Antoniali to a spinal pain clinic. She attended on two occasions.
- [11] Dr. Leung discussed exercise with her. He testified that the full program of exercise he recommended would take 45 minutes, two or three times per day for three to six months. He encouraged her to increase her activity level. Concurrently, he was treating her for depression and anxiety.
- [12] At the time of trial, Ms. Antoniali continued to experience difficulty with her back. Dr. Leung said in his medical report dated October 11, 2006:

In summary, Rita Antoniali had a problem with her mid back and right lower back prior to the accident, and she required monthly manipulative therapy. After the accident, she developed neck pain, mid back pain, low back pain with episodic pain in her hips and right thigh. From July 2004 to April 2005, she had to stop working because of increase in back pain. In April 2005, she was able to resume work. As of September, 2006 she still has mid-low back pain. She is obese and in poor physical fitness which contributed to her problems. However, she went through most of her pregnancy working in the medical office which included moving charts, boxes and small objects. She also had a daily forty-five-minute commute each way on public transportation, which she was able to cope. She would improve further if she can receive a one-to-one personal trainer for rehabilitation and reconditioning her, about thirty six times at one to two times per week. She would be able to work full time as a medical office assistant or similar works. If another accident happens, she may have a long and difficult recovery.

[13] Between the date of that letter and trial, Ms. Antoniali was off work for substantial periods of time both because of her injuries and difficulties in arranging child care for her daughter. Dr. Leung confirmed that she continued to experience mid and low back pain during this period.

[14] Two specialists, Doctor Stewart, a specialist in physical medicine and rehabilitation and Dr. Cameron, a neurologist, examined but did not treat Ms. Antoniali. Both testified at trial.

[15] I was not able to accord significant weight to Dr. Cameron's assessment of the contribution of the collision to Ms. Antoniali's condition and his prognosis because of the inaccurate history provided by Ms. Antoniali. Nor do I accord significant weight to his opinions on cross-examination concerning a complex scenario of assumptions. In my view, Ms. Antoniali's anxiety disorder and her tendency to focus on the November collision as the sole source of her injuries cause her to be a very poor historian. However, I am not prepared to conclude that she is intentionally magnifying the contribution of the November 2003 collision for the purpose of this litigation.

[16] Dr. Stewart had an opportunity to review Dr. Leung's clinical records before testifying. She was aware of the pre-collision history of injury and complaint on the part of Ms. Antoniali. Dr. Stewart said in her November 17, 2007 report:

In my opinion, she has not had adequate rehabilitation for her injuries, as her treatment has been entirely passive. Although it has been four years since her injury, in my experience, women who become pregnant while recovering from soft tissue injuries have a relative hiatus in their recovery because of the normal hormonal changes of pregnancy which soften the body's ligaments. These hormonal changes persist until three to six months after delivery or, if the woman breastfeeds her baby, until three to six months after cessation of breast feeding. This factor means that she has lost essentially two years of recovery time and I am therefore optimistic that she can improve further.

I would recommend that she be provided with a personal trainer to establish and monitor a regular gym and pool exercise program that she can continue on her own once the trainer is no longer involved. I would also recommend that she obtain a cordless telephone headset for work. I discussed with her the importance of pacing her activities, as she has a tendency to push herself beyond her limitations, and in fact she has very little idea what her limitations are in terms of sitting, standing or walking tolerance, for example. I also recommended that she pursue relaxation techniques and activities to address the muscle tension component of her pain.

With the recommended approach, it is likely that Ms. Antoniali will notice some improvement and will gain better control over her residual symptoms. However, she will probably continue to experience neck and back pain and occasional headaches over the long term, with more severe back pain than that which she experienced prior to the November 7, 2003 motor vehicle accident.

Although with further improvement she will probably be able to increase her work hours somewhat, I am not optimistic that she will be able to return to full time work. It is likely that she will continue to be restricted to no more than four days of work per week because of her injury. She would be unable to do more physically demanding work and in sedentary work she will continue to require the flexibility to change her work tasks and position periodically throughout her work day.

It is likely that she will continue to require assistance with heavier housekeeping tasks because of her injury. It is also likely that she will continue to be restricted from more strenuous and jarring recreational pursuits, because of her neck and back pain. There will probably be some improvement in her tolerance for keyboarding but she will probably not be able to play for hours as she did prior to the motor vehicle accident.

She will not require any surgery in future as a result of her injuries in the motor vehicle accident. The injuries will not result in degenerative changes in her spine in the future. I would regard the disc herniation at L3-4 noted on an MRI scan of her back after the accident to be an incidental finding, unlikely related to the motor vehicle accident. Such findings are common in the general population even in the absence of trauma. The disc herniation is unlikely to be causing or contributing to her low back pain.

[17] Dr. Stewart was of the opinion that, even at the time of trial, a regular program of stretching and conditioning would improve Ms. Antoniali's level of functioning.

The Effects of Horseback Riding

[18] The evidence does not support attribution of significant injury to the horseback riding. A photograph was placed in evidence of Ms. Antoniali riding a horse during her honeymoon. The photograph and her description of a tranquil ride belie a vigorous, injury-causing incident.

Functional Capacity Evaluations

- [19] Reports concerning functional capacity evaluations of Ms. Antoniali carried out by occupational therapists were placed in evidence on behalf of both the plaintiff and the defendants. Both occupational therapists testified. Both reports concluded that Ms. Antoniali was capable of performing the duties related to her employment with the workplace accommodations that were presently in place. One therapist commented on her lack of physical conditioning. This observation was confirmed by the other evidence at trial.

The Injury Caused by the Collision

- [20] I am satisfied that Ms. Antoniali had significant problems with her neck and back before the November 2003 collision. Although they troubled her on a chronic basis, they did not interfere with her ability to perform all duties related to her employment, or cause any absences from work. Her condition after the November 3, 2003 collision was markedly worse. I am satisfied that the collision markedly aggravated her pre-existing condition. Her level of functioning has gradually improved between the time of the collision and the time of trial. At the time of trial, she was able to return to four-day per week employment, albeit with more difficulty than was the case before the collision. She continues to suffer greater pain and disability than she did before the collision.
- [21] The measure of the defendants' liability for the injuries caused by the November accident is the extent to which they made the plaintiff worse off by causing new injury or aggravating the pre-existing injury. The baseline against which the contribution of the defendants' conduct to Ms. Antoniali's injuries must be measured is the likely condition of her lower and mid back had the November collision not taken place.
- [22] I am satisfied that Ms. Antoniali suffered an aggravation of her pre-existing back and neck injury and that the effects of that aggravation will continue well beyond trial. In my view, she is unlikely to return to her pre-collision level of functioning. I have assessed Ms. Antoniali's continuing disability on the assumption that she will embark on and follow an exercise program in the future.

Loss of Income Earning Capacity

- [23] An award for loss of capacity to earn income in the future must be assessed in light of the contingency of Ms. Antoniali having more children and reducing her participation in the workforce as a result. Taking into account the general nature of Dr. Stewart's prognosis and the danger of prolonged recovery from any future trauma mentioned by Dr. Leung, the appropriate award for future loss of earning capacity is \$50,000. That award is subject to a reduction for her failure to mitigate her injuries.

Future Cost of Care

[24] A substantial award for future cost of care is sought by the plaintiff. There is little evidence to substantiate an award in many of the categories sought. However, I am satisfied that Ms. Antoniali will incur a substantial ongoing cost for a personal trainer and for heavier housekeeping chores. Future continuing costs of \$1,000 per year, given Ms. Antoniali's life expectancy at trial (another 46.3 years), will result in a present value award of \$22,569. I am satisfied that an estimate of \$500 per year for five years or more for the assistance of a personal trainer and \$1,000 per year for approximately ten years for assistance with heavy chores is appropriate. Accordingly, I assess the present value of Ms. Antoniali's likely future costs in this category at \$13,000. This award, also, is subject to reduction for failure to mitigate her injuries.

Special Damages

[25] Special damages for a sacral belt, acupuncture, chiropractic treatment, physiotherapy treatment and mileage to and from medical appointments have been established in the amount of \$1,384.

Past Loss of Earnings

[26] I accept the summary of Ms. Antoniali's loss of earnings as set out in the plaintiff's Summary of Wage Loss between the time of the collision and the end of May 2007 as a proper quantification of her loss subject to the issue of mitigation. Her loss for that period is \$15,293.

[27] Between June 1 2007 and trial I accept that she experienced a further earnings loss. However, that loss was due to difficulties she experienced in arranging child care as well as the effects of her injuries. Subject to the mitigation issue, I attribute \$6,000 of her earnings loss during that period to the injuries caused in the collision.

Non-pecuniary General Damages

[28] It is clear that Ms. Antoniali was suffering from a previous injury to her back and neck at the time of the November 2003 collision. I am satisfied that the November collision caused substantial new or aggravated injury to Ms. Antoniali's lower and mid back. She has suffered substantial disability, pain and suffering for the approximately four and one-half years since the collision. She has not been able to engage in most of the recreational pursuits that she engaged in before the collision. Her enjoyment of her new role as a mother has been negatively impacted. However, not all of the pain and disability she suffered during this period was attributable to the November collision. In the absence of the new injury she suffered in that collision she would have been troubled by the likely continuation of her pre-collision back and neck difficulties. I am satisfied that an award of \$50,000 for non-pecuniary general damages for her collision related injuries, both past and future, is appropriate to

reflect her loss. I assign those damages approximately equally to the pre-trial and post-trial periods.

Mitigation of damages

[29] In *Graham v. Rogers*, 2001 BCCA 432, leave to appeal to S.C.C. refused (2002), 173 B.C.A.C. 21 (note), at para. 35, Rowles J.A. writing for a majority of the Court of Appeal succinctly stated the principle of mitigation of damages in personal injury cases as follows:

Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue.

[30] In this case, the defendants submit that Ms. Antoniali unreasonably failed to embark on a program of exercise under the guidance of a personal trainer to rehabilitate herself and reduce or eliminate the continuing effect of the injuries on her.

[31] In order to conclude that Ms. Antoniali's damages should be reduced by application of the principle that a plaintiff has a positive duty to mitigate his or her injuries, I would have to find that the defendant has established:

1. that a program of stretching and conditioning under the guidance of a personal trainer would have reduced or eliminated the effect of the injuries;
2. that the reasonable plaintiff in Ms. Antoniali's circumstances would have followed such a program;
3. that Ms. Antoniali unreasonably failed to follow such a program and;
4. the extent to which Ms. Antoniali's damages would have been reduced if she had followed such a program.

Would such a program have been effective?

[32] Dr. Stewart is a specialist in physical medicine and rehabilitation. I am satisfied that her evidence provides the safest guide to the likely efficacy of an exercise program. She expressed the opinion that even at the time of trial a program of stretching and conditioning would be likely to improve her functioning. However, it was clear from her evidence and that of Drs. Cameron and Leung that this has been true for some time. Dr. Stewart commented that in the early stages of an injury individuals are usually so sore that they cannot engage in an exercise program. She said that many people are not ready to perform active rehabilitation for as much as a year after the injury.

[33] She observed that, in Ms. Antoniali's case, she assumed household and child care duties after the collision that reduced the time that she had to devote to both work and rehabilitation.

- [34] She agreed that injured persons improve most with active rehabilitation in the first two or three years after an injury.
- [35] I am satisfied that, had Ms. Antoniali engaged in an active rehabilitation program beginning one year after the collision, she would have significantly reduced the disability that she has experienced.

What is the duty of a reasonable person in Ms. Antoniali's circumstances?

- [36] In *Janiak v. Ippolito*, [1985] S.C.R. 146, Wilson J. dealt with an allegation of failure to mitigate by refusing to undergo a further operation. The Court distinguished between failure to mitigate by reason of a psychological "thin skull" that developed after the tortious act that rendered a person incapable of making a rational choice and unreasonable behaviour of a person capable of making a rational choice. In the case before me, Ms. Antoniali falls in the second category. The reasonableness of her post-collision actions is at issue.
- [37] The reasonableness of Ms. Antoniali's actions in neglecting to embark upon and continue with an active rehabilitation program must be assessed in light of her circumstances at the time of and following the collision. After the collision and until trial, her injuries significantly reduced her energy level. She was "exhausted" much of the time. The commitment of time and effort involved in a rehabilitation program are substantial. Dr. Leung estimated two or three 45-minute periods of exercise per day. Ms. Antoniali became pregnant shortly after the collision and took on child care duties upon the birth of her daughter in May 2006. Ms. Antoniali exercised frequently at a community pool for a period of months. She exercised at home sporadically after the collision but did not commit to a regular program of supervised strengthening exercises. She attended a chiropractor on the advice of Dr. Leung for an extended period. She took approximately 25 treatments, twice per week at first and then as needed. She was being treated by Dr. Leung for panic attacks and depression both before and after the collision. She was receiving counselling for her depressive symptoms after 2005.
- [38] In *Humphrey v. Rancier Estate*, [1985] B.C.J. No. 835 (S.C.), McLachlin J. discussed the application of the principle that a plaintiff is under a duty to mitigate his or her loss:

Another issue in assessment of damages, both non-pecuniary and pecuniary, is the plaintiff's alleged failure to mitigate. The plaintiff has followed all her medical advice with the exception of reducing her weight. She was grossly obese before the accident, weighing about 260 pounds; she is not quite five feet tall. She now weighs over 200 pounds and continues to be grossly obese. There is no doubt on the medical evidence and the evidence of the therapists that her disability and pain would be less if she lost a considerable amount of weight.

The question is whether the plaintiff has taken reasonable steps to minimize her loss. The court must assess whether this test has been met by looking at all the circumstances of the case. Here we have an obese lady before the accident - someone who had been obese all her adult life. Her brother and sister are both obese. She appears, as her counsel put it, to be a weak woman in the

sense that she has not had very good success at controlling her smoking or her eating on a consistent basis in the past despite medical advice and despite her clear efforts. She has tried to lose weight and has succeeded to an extent, at least temporarily. She is still trying, she says.

Of equal importance to the principle that the plaintiff must act reasonably in minimizing her loss and her damages, is another principle, namely that the defendant takes his victim as he finds him or her. In the circumstances in this case, given the plaintiff's pre-accident history of obesity, given her particular personality, given her honest efforts from time to time to lose weight and kept it off, I am not satisfied that it can be said that the plaintiff has acted unreasonably and has failed to mitigate her damages, with the result that her damages should be lessened because she has not lost weight.

[39] In *Savage v. Townsend*, [1998] B.C.J. No. 2190 (S.C.) Holmes J. considered the reasonableness of the actions of a plaintiff's who was alleged to have failed to undertake and adhere to regular exercise programs recommended by her doctors. He said (at para. 89 - 90):

A defendant who injures a plaintiff is not entitled to expect perfection from the injured person in pursuing rehabilitation. The plaintiff must be reasonable and sincere in her efforts to promote recovery. The plaintiff was less than perfect, and undoubtedly paid a price in pain and discomfort on occasion. I accept however the plaintiff met a reasonable standard of care concerning exercise with regard to her own rehabilitation.

The defendant has not met the onus of proof required for the plaintiff to be found to have contributed to her own damages. In the assessment of her non-pecuniary damages however I have taken account of the need for the plaintiff to follow an almost daily regime in the future and assumed she will benefit accordingly.

[40] In *Gibbs v. Skemp*, [1998] B.C.J. No. 680 (S.C.) Bennett J. reduced a plaintiff's damages by 10% for failure to mitigate. She said (para. 58):

I find that the plaintiff failed to follow the exercise program that was recommended. I accept that she did some walking, but by and large she maintained a sedentary life-style that has been confirmed by the medical evidence. This was likely the worst thing she could do in terms of achieving recovery. She has an obligation to assist in her recovery, even if it meant becoming more physically active than before. The burden of establishing a failure to mitigate is on the defendant. I find that the defendant has met the onus in this case that the plaintiff did not take all reasonable steps towards her recovery.

[41] I turn now to Ms. Antoniali's actions following the collision.

[42] I am satisfied that Dr. Leung discussed active rehabilitation with her when they talked about her condition while she was at work. He did not refer her to an active rehabilitation program. However, there is no doubt that Ms. Antoniali was aware of the importance of an active rehabilitation program to her recovery.

[43] Finances in the Antoniali household were tight. Ms. Antoniali discussed engaging a personal trainer in 2004 with her husband but they did not pursue it because of other financial demands. She did embark on a prolonged course of chiropractic treatments.

[44] Dr. Leung stated in an October 11, 2006 report to Ms. Antoniali's counsel:

She would improve further if she can receive a one-on-one personal trainer for rehabilitation and reconditioning her, about thirty six times at one to two times per week.

[45] At that time, she had been suffering from her injuries for almost three years. Her intermittent attempts at exercise had not helped her. She had not obtained sustained relief from chiropractic treatment. Dr. Leung had earlier encouraged her to embark on a regular exercise program. The physiotherapist who saw her shortly after the collision recommended to her that she continue with exercises he taught her. She exercised sporadically and then turned her mind to chiropractic treatment.

[46] In October 2007, she was examined by Dr. Stewart. Dr. Stewart told her that a regular stretching and strengthening program was required. Her daughter was 17 months old.

[47] By early 2007, and certainly by October 2007, it was unreasonable for Ms. Antoniali, even in her circumstances, to fail to commit to the type of program suggested by both Dr. Leung and Dr. Stewart. There is no indication that she took any steps to undertake such a program.

Would the effects of Ms. Antoniali's injuries have been reduced?

[48] The evidence of Dr. Stewart and Dr. Leung satisfies me that there is a substantial likelihood that the effects of Ms. Antoniali's injuries stemming from the November 2003 collision would have been lessened had she followed the recommended program of stretching and strengthening exercises. The effects may have been eliminated entirely after a period of adherence to such a program. To the extent that continuing effects of the injuries from the November 2003 collision could have been lessened or eliminated entirely, the defendant should not have to bear the consequences of their continuation.

[49] I assess the appropriate reduction of her pre-trial damages to reflect her failure to mitigate to be 15% of those damages.

[50] I assess the impact of the failure to mitigate on her post-trial damages at 50% of those damages.

Summary

[51] (1) Non-pecuniary general damages:

\$25,000 pre-trial non-pecuniary general damages - to be reduced by 15% = \$21,250

\$25,000 post trial non-pecuniary general damages - to be reduced by 50% = \$12,500

(2) Future loss of earning capacity:

\$50,000 - to be reduced by 50% = \$25,000

(3) Future cost of care:

\$13,000 to be reduced by 50% = \$6,500

(4) Special damages \$1,384

(5) Loss of wages:

\$15,293 to May 22 2007

\$6,000 after May 22 2007 - to be reduced by 15% = \$5,100

Total damages \$87,027

[52] Unless there are matters arising from these reasons of which I am unaware, in which case counsel have liberty to apply, the plaintiff is entitled to her costs on scale B.

"B.M. Preston J."

The Honourable Mr. Justice Preston

August 29, 2008 - Revised Judgment

Corrigendum to the Reasons for Judgment issued advising that there was an error on the front page regarding Counsels' names on behalf of the defendants. Mr. R.J. Merlo was co-counsel with Mr. Doll and this is now reflected on the front page of the Judgment.

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