
CANADA / JUDGMENT

Barta v. DaSilva

2018 BCCA 68

COURT

British Columbia Court of Appeal

DECIDED

23 February 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCCA 68 Barta v. DaSilva

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Barta v. DaSilva,

2018 BCCA 68

Date: 20180223

Docket: CA42411

Between:

Alex Barta

Appellant

(Plaintiff)

And

Joao F. DaSilva

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated November 10th, 2014 (Barta v. DaSilva, 2014 BCSC 2113, Vancouver Docket M092738).

Counsel for the Appellant:

T.J. Delaney

Counsel for the Respondent:

J.W. Joudrey

Place and Date of Hearing:

Vancouver, British Columbia

February 5, 2018

Place and Date of Judgment:

Vancouver, British Columbia

February 23, 2018

Written Reasons by:

The Honourable Madam Justice Stromberg-Stein

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Savage

Summary:

The appellant appeals the trial judge's finding that the motor vehicle accident did not cause a mild traumatic brain injury that impaired his ability to manage his financial affairs. Held: Appeal dismissed. This was a fact-driven case. This court will not interfere with the judge's findings of fact absent palpable and overriding error, which has not been demonstrated.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

- [1] The appellant, Alex Barta, was injured in a motor vehicle accident in July 2007. He claimed the accident caused a mild traumatic brain injury (MTBI), which affected his ability to manage his financial affairs, resulting in losses of approximately \$5 million. The trial judge found that Mr. Barta had suffered a mild concussion with no lasting consequences. As well, he experienced headaches and sustained soft tissue injuries to his neck and back, which affected his recreation, relationships and anxiety levels for about four years after the accident. The judge awarded Mr. Barta \$75,000 in non-pecuniary damages and \$2,750 in special damages. The judge concluded the accident did not cause Mr. Barta's financial losses.

- [2] The appellant challenges the trial judge's findings of fact that the accident caused a mild concussion that resolved quickly and not a long-term MTBI; that Mr. Barta's pattern of stock trading did not change after the accident; and that Mr. Barta's ability to trade securities was not impaired as a result of the accident.

Issues on Appeal

- [3] The appellant raises the following grounds of appeal:
1. The trial judge misapprehended or misunderstood the brain injury evidence.
 2. The trial judge erred by failing to recognize that other injuries from the accident caused or contributed to Mr. Barta's cognitive difficulties and, therefore, losses.
 3. The trial judge misapprehended the financial evidence and erroneously concluded that the value of Mr. Barta's stock portfolio increased after the accident.
 4. In the alternative, the trial judge erred in making no award for Mr. Barta's diminished earning capacity.

Appellate Review of Findings of Fact

- [4] Absent a palpable and overriding error affecting the trial judge's assessment of the facts, an appellate court will not interfere with a finding of fact or an inference based on those facts: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10, 19 and 21-25. A palpable error is one that is plainly seen, while an overriding error is one that altered or may have altered the result: *Van Mol (Guardian ad litem of) v. Ashmore*, 1999 BCCA 6 at para. 11, leave to appeal ref'd [2000] 1 S.C.R. vi [Van Mol]. This Court's task "is to decide whether, on the basis of all the evidence, there was a body of evidence which was properly, judicially, and reasonably capable of supporting the conclusion which the trial judge reached": *Van Mol* at para. 13.

Facts

- [5] On July 29, 2007, Mr. Barta and Mr. DaSilva were involved in a motor vehicle accident. Mr. DaSilva pulled out quickly in front of Mr. Barta, who did not have the opportunity to avoid a collision. Both vehicles were heavily damaged. Mr. Barta believed he was unconscious, perhaps for 20-30 seconds. Following the accident, he recalled a woman banging on his window. He remembered that his head was resting on the steering wheel or the deployed airbag. He recalled that the door was jammed and he helped the woman push it open. He remembered that she helped him to the curb where he sat down. He felt dizzy and confused, had a "horrific headache", his neck hurt and his left elbow was bleeding. He recollected that the woman gave him a piece of paper with her contact information. He recalled that an ambulance arrived at the accident scene within 10 minutes. The ambulance crew assessed Mr. Barta at 15 on the Glasgow Coma Scale, which represented full alertness. Mr. Barta declined to go to the hospital. He recalled another woman apologizing and asking if he was okay. He remembered leaving the accident scene in a tow truck, going to the impound yard

and then taking a taxi home.

- [6] Prior to the accident, Mr. Barta had earned a substantial income through securities trading and he had a significant amount of capital invested in the stock market. He returned to trading securities four days after the accident. Mr. Barta engaged in trading that caused him to lose substantial capital. Further, after living modestly for many years, in July 2008 Mr. Barta purchased a new home that he was unable to afford, which resulted in bitter and ultimately unsuccessful litigation.
- [7] Mr. Barta contended his financial losses, totalling approximately \$5 million, resulted from a MTBI he suffered in the accident, as he was no longer able to apply his previous careful judgment.
- [8] Following the accident, one significant event occurred in April 2008. A security guard assaulted Mr. Barta. His left arm was twisted and he fell to the floor, apparently striking his head.

Trial Decision

- [9] Mr. DaSilva did not dispute liability for the accident but he disputed the extent of the injuries and losses that Mr. Barta claimed he had sustained because of the accident.
- [10] Mr. DaSilva did not contest Mr. Barta's claims that he had headaches and soft tissue injuries to his neck and back as a result of the accident. However, he contended that Mr. Barta's claimed soft tissue injury to his left shoulder was caused by the April 2008 assault. An orthopedic surgeon who testified on behalf of Mr. Barta was unable to conclude which incident caused the shoulder injury. The doctor testified that Mr. Barta had not told him about the assault when he had conducted his assessment in July 2008. With respect to the shoulder injury, the judge concluded that Mr. Barta had not proven causation, as it was equally possible the injury had been caused by the assault.

Medical Evidence of the Head Injury

- [11] A number of experts testified at trial. The majority of the evidence focused on the alleged MTBI. The cognitive symptoms Mr. Barta reported included headaches, fatigue, being in a mental fog, difficulty concentrating, difficulty remembering, irritability and feeling nervous ("Mr. Barta's condition").
- [12] Dr. Ancill, a psychiatrist specializing in trauma, diagnosed Mr. Barta with a MBTI and reported that he showed signs of "chronic post-concussion syndrome". However, the doctor also acknowledged that his condition could be caused or affected by pain, depression and anxiety. He was not able to pinpoint the exact cause of the symptoms and agreed that depression was at least part of the explanation. On cross-examination Dr. Ancill acknowledged he was not aware of either the April 2008 assault or Mr. Barta's long history of anxiety and unusual cleanliness practices, including washing his hands many times a day,

bringing his own plastic cutlery when he dined out and using napkins or other items to avoid placing his hand on public doorknobs. The trial judge found that because Dr. Ancill was operating with less than a complete medical history for Mr. Barta, his conclusions were unreliable.

- [13] Dr. Armstrong, a general practitioner, diagnosed Mr. Barta with post-concussion syndrome and frontal lobe syndrome. However, the trial judge found that he had overlooked several possible alternate causes of Mr. Barta's condition, including the April 2008 assault and the stressful legal battle that Mr. Barta was engaged in regarding his failed house purchase. With no physical evidence to support the diagnosis, the judge found he could not rely on Dr. Armstrong's opinion.
- [14] Dr. Hearn, a registered psychologist, reported that Mr. Barta was "a robust, resilient person who rarely experienced depression or anxiety" before the accident. The judge rejected this conclusion as it did not accord with the evidence of several other witnesses concerning Mr. Barta's unusual behaviours, which may be indicative of an obsessive or anxious personality. Further, Mr. Barta had been involved in approximately 20 legal proceedings since the early 1990s, which undoubtedly had led to additional stress. Dr. Hearn agreed on cross-examination that if the symptoms described by Mr. Barta had persisted for several months after the accident, it was appropriate to consider explanations other than a MTBI.
- [15] Dr. Lanius, a registered psychologist qualified as a neuropsychologist, screened Mr. Barta in September 2011 but did not complete a full clinical interview and assessment. Like the previous experts, the judge found Dr. Lanius' evidence was unreliable due to a less than complete understanding of Mr. Barta's history, including not being aware of the 2008 assault. The doctor's link between Mr. Barta's financial losses and cognitive difficulties was based in part on Mr. Barta's self-reported consistent pattern of losses after the accident, which the judge found to be inaccurate, as he concluded Mr. Barta did not consistently lose money after that point. As well, Mr. Barta told Dr. Lanius he was a C+ student in school, while school records showed he actually failed most of his classes. Given the inaccurate information Dr. Lanius was working from, the judge concluded little weight could be given to his opinion.
- [16] Dr. Prout, a neurologist, testified on behalf of the respondent. He noted that several symptoms of post-concussion syndrome, including tinnitus, numbness or tingling, double vision and nausea, were not alleged by Mr. Barta. He doubted whether Mr. Barta had actually been unconscious after the accident and stated that while it was possible Mr. Barta suffered a mild concussion, he did not report the symptoms of post-concussion syndrome right away. The doctor suggested the symptoms complained of were disproportionate to the injuries suffered in the accident and it was more likely any behavioural and cognitive issues were caused by Mr. Barta's emotional and psychological issues, including pain and anxiety.

- [17] Dr. Smith, a forensic psychiatrist, testified on behalf of the respondent. She similarly concluded that Mr. Barta may have suffered a mild concussion but that the symptoms would have resolved within a few weeks of the accident. She opined that pain and anxiety were more likely the cause of any problems with memory and poor concentration.
- [18] The judge accepted the opinions of the respondent's experts as he concluded these opinions aligned more closely with other evidence and were more reliable. He concluded that Mr. Barta had suffered no more than a mild concussion in the accident and not a MTBI. He noted the "absence of significant retrograde or anterograde amnesia following the accident, and the alert state of the plaintiff at the accident scene, as evidenced by his GCSS score, do not support a finding of brain injury": RFJ, 2014 BCSC 2113 at para. 60.

Financial Evidence

- [19] Mr. Barta alleged that his losses on the stock market and his decision to purchase a home he could not afford was evidence of his impaired judgment after the accident for which he was entitled to be compensated to the full extent of his loss of approximately \$5 million.
- [20] The trial judge recounted several stressful events in Mr. Barta's life prior to the accident, which added to his anxiety, including that he felt "targeted" by security guards in stores, that he had been falsely accused of improperly touching a young lady, and that he was involved in a number of legal proceedings. After the accident, his attempt to purchase a home in 2008 for almost \$5 million resulted in additional court proceedings.
- [21] At the time of the accident, Mr. Barta had stocks valued at several millions of dollars. Joe Hayes, an expert portfolio manager, testified on behalf of Mr. Barta. He opined that before the accident Mr. Barta was a skilled, disciplined and prudent investor, but afterwards he became ill-disciplined, erratic and made decisions no prudent trader would make. Mr. Barta claimed this shift from risk-adverse to reckless trading demonstrated the impact of the accident on his ability to manage his money.
- [22] Mr. DaSilva's expert, Laurence Boyce, challenged the methodology of Mr. Hayes and concluded that Mr. Barta had carried large unrealized losses prior to the accident and that he was a risk-taker who invested in unproven companies. Mr. Boyce noted that Mr. Barta's losses coincided with the 2008 economic crash, which especially affected the types of companies Mr. Barta tended to invest in.
- [23] The judge found that four days after the accident Mr. Barta resumed stock trading and completed several trades for profit in the next few days. In the month after the accident, the judge concluded Mr. Barta's portfolio had increased in value by over \$100,000. In the year after the accident he continued to make successful trades and increased his portfolio's value by over \$900,000. The trial judge concluded that Mr. Barta's trading behaviour had not changed after the accident, there was no evidence of cognitive impairment during this period, and any losses were due to the 2008 economic crash and retrospectively poor decisions that investors sometimes make. The accident did not compromise his ability to

trade stocks.

[24] Following the release of reasons for judgment and prior to the order being entered, Mr. Barta applied to re-open the trial and lead further evidence about his financial dealings. His application was dismissed.

1. Did the trial judge misapprehend or misunderstand the evidence of brain injury?

Alleged Errors

[25] Mr. Barta submits the trial judge made a contradictory finding of fact by deciding that he had not suffered a MTBI but had suffered a mild concussion, despite the two being equivalent. He further claims the judge overlooked critical evidence and speculated about the cause of Mr. Barta's symptoms. Together, he suggests this constitutes a misapprehension of the evidence and casts doubt on the trial judge's conclusions.

[26] Mr. Barta submits that the trial judge relied on the fact that he did not claim to be experiencing several common post-concussion syndrome symptoms right after the accident. He states this was an error, as the intake assessment from a physiotherapy clinic he attended in late August 2007 lists dizziness, headaches, tinnitus, double vision, drop attacks and nausea (some with checkmarks and some with a circle with a line through it) among the reported symptoms. All these same symptoms were noted in a report from the physiotherapist to the doctor who had referred Mr. Barta to the physiotherapist.

[27] He further suggests that the judge speculated about incidents after the accident, including the 2008 assault, as being potential causes of any brain injury, despite a lack of expert evidence supporting this theory. He emphasizes that while Mr. Barta did scrape his head, there was no evidence that a head injury occurred in the assault. He says the judge relied on this speculative alternative cause to discount the evidence of Mr. Barta's expert witnesses, suggesting their conclusions may have been different had they been aware of this and other incidents which were insignificant.

[28] Mr. Barta suggests these errors are sufficient to set aside the trial judge's findings of fact regarding the head injury.

Discussion

[29] I agree with the respondent that the judge's distinction between a MTBI and a mild concussion is one of semantics. He accepted the opinions of Dr. Prout and Dr. Smith, who considered Mr. Barta's medical records. The judge then concluded that as a result of the accident Mr. Barta suffered at most a mild concussion that had no lasting effects.

[30] Mr. Barta focuses on the physiotherapist's records. The physiotherapist was not called as a witness at trial and the clinical notes and the physiotherapist's report to the referring doctor were entered as business records with no document agreement as to the use that could be made of them. On the physiotherapist's intake form, there is a box listing "Special Questions:

Problems with the following", which lists a number of symptoms. The only symptoms with checkmarks are headaches and dizziness, suggesting these symptoms were present. With respect to the other symptoms - "Tinnitus/Double Vision/Drop Attack/Bowel Bladder/Nausea" - these are marked with a circle with a line through it, suggesting these symptoms were not present. As well, handwritten in this box is "T & N", which the parties agree refers to tingling and numbness, which is marked with a circle with a line through it. The physiotherapist's report to the referring doctor, relied upon by Mr. Barta as evidence of MTBI states: "He complains of dizziness, double vision, nausea, drop attack or changes in bowel and bladder functions. He reports there is no tingling or numbness." This report must contain a construction error, as it contradicts the clinical notes that indicate Mr. Barta did not complain of any symptoms except headaches and dizziness.

- [31] The respondent notes that the judge did not consider the 2008 assault as a possible alternative source of the head injury. Rather, references to the assault by some of the experts and the judge were in relation to the left shoulder injury, the reliability of the expert's opinions, and Mr. Barta's stress levels.
- [32] In my view, none of the alleged errors meets the standard of palpable and overriding errors such that appellate intervention is warranted. The judge was entitled to weigh the evidence and accept the expert evidence that Mr. Barta was not suffering from the long-term effects of a MTBI.
- [33] I would not accede to this ground of appeal.
2. Did the trial judge err by failing to recognize that injuries from the accident caused or contributed to Mr. Barta's condition?

Alleged Errors

- [34] The trial judge accepted the evidence of both Dr. Prout and Dr. Smith, who stated that any cognitive difficulties experienced by Mr. Barta were likely caused, in part, by pain and anxiety. He also found that the accident caused Mr. Barta to suffer from pain for a number of years, which increased his level of anxiety. Mr. Barta argues that these consequences of the accident were a contributing cause of his cognitive difficulties and therefore his financial losses, even if they were not the only cause.

Discussion

- [35] A cause must be necessary to bring about the injury or loss before liability attaches. The standard test for causation in negligence is the "but-for" test, which questions whether the injury or loss would have occurred had the alleged negligence not occurred. This means the negligent act must have been necessary to bring about the injury in that the injury would not have occurred without it: *Ediger v. Johnston*, 2013 SCC 18 at para. 28. A finding of causation, once made by the trial judge, is a finding of fact: *Ediger* at para. 29.

[36] The trial judge concluded that "the effects of the accident did not compromise [Mr. Barta's] ability to trade on the stock market" and that there was "no possible inference to be drawn that cognitive impairment had damaged his trading ability" in the year after the accident: RFJ at paras. 56, 60. Similarly, his decision to purchase the house was not unreasonable at the time: RFJ at para. 58. The appellant has pointed to nothing on appeal that would demonstrate that these conclusions were in error. The findings of trial judge are entitled to deference.

[37] I would not accede to this ground of appeal.

3. Did the trial judge misapprehend the financial evidence and erroneously conclude that the value of Mr. Barta's stock portfolio increased after the accident?

Alleged Errors

[38] Mr. Barta submits that the trial judge relied on incorrect valuations of his portfolio in determining that it increased in value after the accident. He argues that substantial value came from stocks he had received to pay off a pre-existing debt. Rather than growing by \$100,000 in the month after the accident, he maintains the delivery of shares valued at around \$150,000 meant that the portfolio actually fell in value by \$50,000. Similarly, he argues the increase in value over the year after the accident was due largely to cash and share transfers made in payment of that debt. The total repayment in cash and stocks meant an increase in value of about \$997,000 between 2007 and 2008. The trial judge noted that the actual increase during that period was \$921,000, demonstrating that Mr. Barta actually lost money.

[39] He also argues that the loss in the year prior to the accident, cited by the judge as an example of a bad investment decision, was inaccurate because the judge referred to a stock price that was "on the books", which was not reflective of the stock's actual value due to the fact it was a "pink sheet" stock not traded on the stock exchange. Mr. Barta says the actual value of his portfolio was much lower than the judge suggested and the stocks were mostly sold prior to the accident.

[40] Lastly, Mr. Barta says the judge erred in finding he decided to purchase the house at a time when his portfolio had grown substantially. He says the contract for purchase and sale was signed on November 6, 2008, after the stock market crash, when the value of his portfolio had fallen to \$600,000. Mr. Barta maintains these erroneous findings were material to the judge's conclusion that there was no lost earning capacity.

Discussion

[41] The judge relied on the evidence of Mr. Boyce, who acknowledged the transfer of the shares in question and took them into account. Both Mr. Boyce and the trial judge concluded there was no change in the pattern of trading after the accident. There was evidence that Mr. Barta had made successful, profitable trades in the months after the accident, up to the

market crash in September 2008. Regarding the purchase of the home, the judge found that Mr. Barta had decided to make the purchase in July 2008 as Mr. Barta testified that he was negotiating financing in June or July 2008.

[42] The judge made findings of fact he was entitled to make based on his assessment of the evidence which he accepted. His findings of fact are entitled to deference.

[43] I would not accede to this ground of appeal.

4. Did the trial judge err in making no award for Mr. Barta's diminished earning capacity?

Alleged Errors

[44] In the alternative, Mr. Barta claims that even on the facts as found by the trial judge he should have awarded some damages for diminished earning capacity. He suggests the judge erred by failing to consider his lost earning capacity, regardless of any financial loss, given that the judge concluded the accident had a significant impact on Mr. Barta's life. He suggests there was evidence at trial that he worked fewer hours and had difficulty concentrating after the accident. Even if no loss of earnings was established, he argues the trial judge should have made an assessment at large because of his diminished capacity to work.

Discussion

[45] Although pleaded, it does not appear that damages for loss of earning capacity was argued at trial.

[46] Mr. Barta relies on *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, for the principle that a loss of earning capacity can be compensated even when there is no loss of income. However, in *Rowe* the diminished capacity of the plaintiff was firmly established and the issue was one of quantification.

[47] Mr. Barta was required to demonstrate that his capacity to earn an income was diminished and that there was a real and substantial possibility of loss: *Grewal v. Nauman*, 2017 BCCA 158 at paras. 43-48. He did not do so. The judge found the accident did not affect Mr. Barta's ability to trade stocks, meaning his capacity to earn an income from stock trading was not impaired.

[48] The judge did not err in not awarding damages for the loss of earning capacity. I would not accede to this ground of appeal.

Conclusion

- [49] This was a fact-driven case. The trial judge accepted the evidence of Drs. Prout and Smith and found that as a result of the accident the appellant had suffered a minor concussion with no lasting effect, and no effect on his stock trading and financial decisions. The judge accepted the evidence of Mr. Boyce that the pattern of trading was no different before and after the accident. Therefore, he concluded there were no financial losses caused by the accident.
- [50] With respect to the first three grounds of appeal, the judge was entitled to decide what evidence to accept and to come to conclusions based on his assessment of the evidence. This Court will not interfere with the judge's findings of fact absent palpable and overriding error, which, in my view, the appellant has not demonstrated.
- [51] With respect to the fourth ground of appeal, the finding of fact that the injuries suffered in the accident did not affect Mr. Barta's ability to trade securities and earn an income precludes an award for diminished earning capacity in this case.
- [52] I would dismiss the appeal.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Savage"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/18/00/2018BCCA0068.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/barta-v-dasilva-2018>

Prepared on 26 October 2026 · Esheria