
CANADA / JUDGMENT

Ceraldi v. Duthie

2008 BCSC 1812

COURT

Supreme Court of British Columbia

DECIDED

12 August 2008

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2008 BCSC 1812 Ceraldi v. Duthie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ceraldi v. Duthie,

2008 BCSC 1812

Date: 20080812

Docket: M072453

Registry: Vancouver

Between:

Christina Ceraldi

Plaintiff

And

Karen Louise Duthie

Defendant

Corrected Judgment: The Defendant's name was corrected to read

Karen Louise Duthie on July 13, 2009.

Before: The Honourable Madam Justice Dardi

Oral Reasons for Judgment

In Chambers

August 12, 2008

Counsel for the Plaintiff

R. E. McIntyre

Counsel for the Defendant

S. J. Morris

Place of Hearing:

Vancouver, B.C

I. INTRODUCTION

- [1] By this 18A application the plaintiff seeks the summary disposition of her personal injury action arising out of a minimal impact collision with the defendant's vehicle. The plaintiff was rear-ended by the defendant. Liability is admitted; however, the plaintiff's claim for personal injuries has been denied as the collision has been characterized by the defendant as a low-velocity impact.
- [2] The plaintiff alleges soft tissue injuries to her neck, left shoulder, and mid-back. The plaintiff's evidence is that she also experienced headaches and problems sleeping following the collision. She advances claims for wage loss in the amount of \$10,198.47, and special damages in the amount of \$1,065.00.
- [3] The defendant opposes the application for judgment pursuant to the Rules of Court, R. 18A, on the ground that the defendant filed a jury notice. The defendant acknowledges that, aside from this objection, the issues and facts are suitable for determination by R. 18A. If the court proceeds with the plaintiff's application, the defendant submits that the plaintiff's application should be dismissed as the evidence before the court does not establish that the plaintiff sustained a compensable injury.

Issues

- [4] The issues on this application are as follows:
1. Whether the matter is suitable for determination pursuant to R. 18A;
 2. If so, whether the plaintiff was injured in the collision; and
 3. If so, what her entitlement to damages is.

II. BACKGROUND

Evidence

- [5] The evidence before me on this application includes the following:
1. The affidavit of the plaintiff sworn July 29, 2008 and the medical-legal report of Dr. McGregor, which was prepared on September 15, 2007;

2. The affidavit of the defendant sworn July 31, 2008;
3. The affidavit of Steven Hamilton, claims estimator at the Insurance Corporation of British Columbia ("ICBC"), sworn July 31, 2008; and
4. Extracts from the examination for discovery of the plaintiff conducted on November 14, 2007.

Procedural History

- [6] The writ and the statement of claim were filed on May 31, 2007. A jury notice was filed by the defendant on October 2, 2007. The plaintiff was examined for discovery on November 14, 2007. The defendant has not been examined for discovery. The jury trial of this matter is scheduled for December 1 through 5, 2008.

The Accident

- [7] At the time of the accident on January 4, 2007, the plaintiff was driving a 2002 Toyota Echo on the upper level highway at the Lonsdale exit in North Vancouver. She was stopped at a red light at the intersection of Lonsdale and the upper level highway when the rear of her car was struck by the defendant's vehicle. The plaintiff was wearing a lap and shoulder seat belt.
- [8] The plaintiff's evidence is that, on impact, her car moved forward and her body moved forward and backward. Her head hit the headrest. The defendant admitted to the plaintiff that she did not see the plaintiff's vehicle. The defendant was driving a 1990 Honda Civic. The defendant's evidence is that just prior to accident she was stopped approximately 7 feet behind the plaintiff's vehicle. Her foot came off the brake pedal and her vehicle slowly rolled into the rear of the plaintiff's vehicle. She described the impact as "a very gentle bump." She estimated the speed at 2 kilometres per hour. She did not observe the plaintiff's vehicle being moved forward as a result of the impact. There were no emergency vehicles called to the accident.

Damage to the Vehicles

- [9] The defendant did not observe any new damage to her own vehicle as a result of the accident. She did not bring her vehicle to an ICBC claims centre for inspection until February 6, 2007. There is no evidence of any inspection by ICBC of the defendant's vehicle.
- [10] Insofar as any damage to the plaintiff's vehicle is concerned, the plaintiff deposed that the day following the accident she observed the rear bumper of her car was scratched.
- [11] The defendant relies on an affidavit from Steven Hamilton, a claims estimator working at the ICBC. In his affidavit Mr. Hamilton describes the inspection of the plaintiff's vehicle on January 8, 2007. He found no "obvious" sign of impact and while he identified scratches and scrapes on the rear bumper, none appeared to be "obviously" new. Mr. Hamilton did not identify any new damage to the plaintiff's vehicle warranting repairs and the ICBC low

velocity impact claim form annexed to his affidavit describes the old damage as greater than any new damage.

Injury

- [12] The plaintiff is a 46-year-old homecare nurse. After the accident, on Thursday, January 4, 2007, Ms. Ceraldi felt stunned, her neck felt tight, and she had a pinching sensation in her mid-back area. After she arrived home, she felt pain and stiffness to her neck. She took Extra Strength Tylenol and iced her neck. That night the plaintiff had problems sleeping. This disrupted sleep persisted for approximately 6 weeks. The next morning she felt pain to her mid-back and left shoulder and she experienced a headache. On the Sunday following the collision, her neck pain became worse and she felt intense tightness to her neck and shoulder muscles. She continued experiencing headaches. She continued icing her neck and taking non-prescription pain management medication.
- [13] The plaintiff went to see her family physician, Dr. McGregor, on January 9, 2007. Upon examining the plaintiff, Dr. McGregor found a decreased range of motion to the neck and tenderness to palpation of the muscles of the upper and lower neck, and to the muscles of the left shoulder blade. Dr. McGregor advised the plaintiff to take time off work and prescribed physiotherapy and massage therapy treatments. The plaintiff attended Lynn Valley Physiotherapy Clinic and received 13 physiotherapy treatments from January 15, 2007 to February 26, 2007. She also attended the Northview Massage Therapy Clinic and received 11 massage therapy treatments from January 27, 2007 to March 21, 2007.
- [14] The plaintiff, who was employed as a homecare nurse, was unable to work from January 4, 2007 to February 27, 2007. The plaintiff returned to work full time on March 26, 2007, after a pre-booked family vacation. When she returned to work, the plaintiff experienced increasing stiffness to her neck and left shoulder. Dr. McGregor prescribed further physiotherapy. The plaintiff performed stretching exercises prescribed by the physiotherapist and made some ergonomic changes to her workplace.
- [15] By May 2007, Dr. McGregor noted a mild decrease in the range of motion of neck flexion and tenderness to palpation to the left lower trapezius muscle and extending over the left shoulder. The plaintiff attended the Loughheed Physiotherapist Corporation and received a further 13 treatments from May 4, 2007 to September 5, 2007. The plaintiff also saw Dr. McGregor on June 5, 2007 and, upon examination, Dr. McGregor noted a decreased range of motion on left neck rotation and flexion.
- [16] The plaintiff's symptoms were significantly improved by August 2007, which was approximately eight months post-accident. She continues to experience occasional stiffness and tightness to her neck and shoulders, depending on her activities and workload. At work she is required, at times, to carry equipment, including a camera and computer tablets, which increases the stiffness to her neck and shoulders. She continues to do stretching exercises and takes analgesics for relief.

[17] There is no evidence before me of the plaintiff curtailing any social or recreational activities because of her injury.

[18] Dr. McGregor's report refers to her examination of the plaintiff on various occasions with specific reference to the plaintiff's responses to palpation and range of motion testing. As Mr. Justice Slade commented in *Pennykid v. Escribano*, 2004 BCSC 954, [2004] B.C.J. No. 1497 at para. 30: "As is generally the case with soft tissue injuries, there were no objective signs of injury."

[19] In her medical-legal report dated September 11, 2007, Dr. McGregor notes:

In summary, Ms. Ceraldi sustained soft tissue injuries of the neck and left shoulder as a result of the motor vehicle accident. These initially caused her significant pain and stiffness, to the extent that she was unable to work. While she has largely recovered and is currently fully employed, she has continued to experience ongoing stiffness. This is likely to gradually settle over the next 12 to 24 months and is not likely to cause any permanent disability. However, from time to time when she is stressing her neck and upper body more than usual, it is possible she may experience a flare-up of her symptoms, requiring brief periods of time off work and physiotherapy for symptom management.

[20] The plaintiff has not been examined by any other physician at the request of the defendant. The defendant submits that Dr. McGregor's report chronicles only subjective complaints of pain, stiffness, and decreased range of motion largely based on the plaintiff's self-reporting to her doctor. Since the plaintiff's evidence of injury is principally subjective, the defendant submits the evidence should not necessarily be accepted by the court at face value. The defendant also points out that in early November 2007, the plaintiff developed bursitis in the left shoulder, which was unrelated to the accident.

III. DISCUSSION

Suitability for Determination under Rule 18A

[21] To proceed with an 18A application, the court must be able, on the whole of the evidence, to find the facts necessary to decide the issues of law and must be of the opinion that it would be just to decide the issues on the application. In these circumstances, the court should determine the matter. This is particularly so where, as here, the defendant has adduced no evidence to challenge the evidence tendered by the plaintiff and, further, has not shown any substantial basis for concluding that the defendant could succeed in challenging the plaintiff's evidence (see *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263, [2005] B.C.J. No. 1945; and *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, [1989] B.C.J. No. 1003 (C.A.)).

[22] The defendant's only submission regarding the suitability for determination of this matter under R. 18A is that it is unsuitable because the defendant filed a jury notice. The availability of proceeding by way of R. 18A, notwithstanding that a jury notice has been delivered, is

specifically the subject of R. 18A(16). In order to resist the 18A application on this ground, the defendant must show some real identifiable reason or real prejudice as to why this particular case ought to be heard with a jury (see *Bush v. Lundstrom*, 2001 BCSC 170, [2001] B.C.J. No.197). The defendant has not done so in this case. To the contrary, there would be prejudice to the plaintiff if this case were to be tried with a jury. The trial would be longer and would result in increased cost to the parties and to the administration of justice.

- [23] In the language of the rule, I am able to find the facts necessary to decide the issues in this action.
- [24] The only evidence of the plaintiff's injuries is the affidavit from the plaintiff and the report from her family doctor. No evidence has been tendered by the defendant to dispute the plaintiff's evidence that she sustained injuries from the motor vehicle accident. There are no conflicting expert medical opinions. Further, there are no serious inconsistencies in the evidence as to how the accident occurred and there is no independent evidence as to the force of the impact. I find the issues raised by the defendant concerning the plaintiff's credibility minor and insignificant.
- [25] I have determined it is just to decide the issues pursuant to R. 18A. Firstly, the claim for damages is modest and the issues are relatively straightforward. And secondly, a summary trial in this case would be clearly more efficient than the usual course of proceedings; it will save considerable time and expense, and thereby enhance the administration of justice.
- [26] In summary, it is the view of this court that this action is ideally suited for disposition under R. 18A.

Claim on the Merits

- [27] The evidence rendered by the plaintiff establishes, on a balance of probabilities, that the plaintiff was injured in the accident (see *Gordon v. Palmer*, 78 B.C.L.R. (2d) 236, [1993] B.C.J. No. 474 (S.C.)).
- [28] With respect to the plaintiff's claim for non-pecuniary damages, I find the plaintiff suffered soft tissue injuries to her neck, left shoulder, and mid-back, and this injury caused her pain and suffering. I find on the evidence that the plaintiff's injuries to her neck, left shoulder, and mid-back were such that she could not work for two months. She also suffered from intermittent sleeping problems for 6 weeks as a result of the collision.
- [29] There is no suggestion on the evidence that the plaintiff exaggerated her symptoms; rather, the evidence demonstrates that the plaintiff made reasonable efforts to recover from her injury. She attended the physiotherapy and massage therapy treatments prescribed by her doctor.

- [30] On her own evidence, the plaintiff's symptoms had substantially improved by August 2007. After August 2007, she experienced occasional stiffness and tightness to her neck and shoulders. She continues to do stretching exercises and take analgesics for relief.
- [31] I accept Dr. McGregor's opinion, provided on September 15, 2007, that the plaintiff's stiffness will gradually settle over a 12- or 24-month period and, significantly, that it is not likely to cause the plaintiff any permanent disability.
- [32] In summary, I would characterize the plaintiff's injuries as mild to moderate soft tissue injuries that substantially resolved within eight months of the accident.
- [33] Counsel for the defendant, in relying on *Mohammed v. Rai*, 2005 BCSC 1918, [2005] B.C.J. No. 3166, submits that if the court is to award any damages, the court should assess non-pecuniary damages in the range of \$5,000. In contrast, counsel for the plaintiff relies on a series of authorities where damages of \$12,000 to \$14,000 were awarded for pain and suffering. The plaintiff submits a damage award of \$14,000 is appropriate.
- [34] Having reviewed the authorities provided to the court by both the plaintiff and the defendant, I find the plaintiff's injuries are more similar to those described in the plaintiff's authorities. Adjusting for the effects of inflation, I conclude that an appropriate award for non-pecuniary damages in this case is \$13,000.

Past Income Loss

- [35] Based on the evidence, the plaintiff was not fit to return to work any earlier than February 26, 2007, and a claim for past income loss is established. The defendants do not challenge the quantum of the plaintiff's claim for past income loss. The plaintiff is therefore entitled to recover the sum of \$10,198.47 for past income loss.

Special Damages

- [36] The plaintiff claims \$1,065.00 for the cost of massage and physiotherapy treatments. The defendant does not dispute the payment of \$257.15, which is the amount the plaintiff paid for massage and physiotherapy treatments. However, the defendant disputes that the further sum of \$807.85 should be reimbursed to the plaintiff. The plaintiff is not out-of-pocket, as this amount was paid by Blue Cross. The defendant relies in her submissions on the Insurance (Vehicle) Regulation, B.C. Reg. 447/83, s. 88(6).
- [37] Counsel are directed to the decision of this court in *Cleeve v. Gregerson*, 2007 BCSC 1112, [2007] B.C.J. No. 1653 at paras. 86-89. With respect to the plaintiff's claim for \$807.85, for which she has been reimbursed by Blue Cross, the plaintiff is to make written submissions to the court and to the defendant by September 5, 2008. The defendant must provide submissions by September 19, 2008 and reply submissions to be provided by October 3, 2008.

IV. SUMMARY

[38] To summarize, as a result of the injuries the plaintiff suffered in the accident, she is awarded the following damages:

1. Non-pecuniary damages, \$13,000;
2. Past income loss, \$10,198.47;
3. Special damages, \$257.15 (subject to further submissions); and
4. Applicable pre-judgment interest.

I will leave it to counsel to work out the amount of the pre-judgment interest.

[39] If the parties are then unable to reach an agreement on costs, they must make their submission on costs in writing. The plaintiff must provide written submissions to the defendant and to the court by September 5, 2008. The defendant must provide submissions by September 19, 2008 and reply submissions to be provided by October 3, 2008. Counsel should ask that the submissions be directed to my attention.

[40] MS. MACINTYRE: The costs to be determined following those submissions, then?

[41] THE COURT: Failing agreement of counsel.

[42] Anything arising?

[43] MS. MACINTYRE: No, My Lady.

"Dardi J."

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