
CANADA / JUDGMENT

D'Oliveira v. Kal Tire Ltd.

2008 BCSC 1638

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1638 D'Oliveira v. Kal Tire Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D'Oliveira v. Kal Tire Ltd.,

2008 BCSC 1638

Date: 20081128

Docket: S072002

Registry: Vancouver

Between:

Lilly D'Oliveira

Plaintiff

And:

Kal Tire Ltd.

Defendant

- and -

Docket: S083946

Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And:

Kal Tire Distributors Ltd.

Defendant

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Plaintiff:

B.C. Poston

Counsel for the Defendant:

D.R. Lewthwaite

Counsel for ICBC:

D.T. Griffin

Date and Place of Trial:

August 19, 20, 21, 2008

Vancouver, B.C.

Introduction

- [1] The trials in these two lawsuits were heard together and proceeded to a three-day hearing. Both actions relate to a single-vehicle accident on June 5, 2006. Although named differently in the two lawsuits, both defendants were represented by Mr. Lewthwaite and I will refer to them simply as "Kal."
- [2] In the lawsuit she commenced ("D'Oliveira Action"), Ms. D'Oliveira alleges that Kal negligently serviced her brakes on May 25, 2006, eleven days prior to the accident. She alleges that the accident occurred as a result of the condition of the brakes and that the defendant is wholly responsible for her damages.
- [3] In the action it commenced ("ICBC Action"), ICBC alleges that Ms. D'Oliveira's accident was caused by Kal's negligence in repairing Ms. D'Oliveira's brakes, and that as a result of the accident, it paid benefits to Ms. D'Oliveira and also paid a certain amount in damages. The parties to the ICBC Action agreed that if Kal was found liable to Ms. D'Oliveira for her damages arising from the accident, Kal would also be liable to ICBC, and ICBC would be entitled to an order for damages in the amount of \$35,000. The parties to the ICBC Action also agreed that no costs would be awarded to either party in that lawsuit regardless of which party succeeded.

- [4] The parties to the D'Oliveira Action agreed that if Ms. D'Oliveira was entitled to damages, special damages should be calculated at \$995.24. The balance of Ms. D'Oliveira's claim is for non-pecuniary damages, which she argued should be assessed at \$125,000. Kal argued that Ms. D'Oliveira's non-pecuniary damages should be assessed at \$40,000 to \$50,000.

Facts

(a) Prior to June 5, 2006

- [5] Ms. D'Oliveira was born in Canada in August 1927, and was educated in China. She commenced her working life in China and Hong Kong, but returned to Canada around 1950. She raised three sons and now has six grandchildren.
- [6] Ms. D'Oliveira's husband passed away in 1977. After that, she spent some of her working life in Alberta in oil pipeline field offices.
- [7] Around 1997, at the age of 70, Ms. D'Oliveira decided to retire. She wanted to spend more time with and care for her elderly mother, who had recently suffered a stroke.
- [8] Before the June 5, 2006 accident, Ms. D'Oliveira was active. She lived on the bottom floor of a home that she owns with her son Ralph. She regularly attended church, bridge clubs and stay-fit classes, and she did volunteer accounting work. She did her own shopping and lived entirely independently. Ms. D'Oliveira regularly walked or drove her granddaughter to kindergarten or school in Ms. D'Oliveira's neighbourhood.
- [9] Ms. D'Oliveira owned a 1991 Nissan Stanza ("Nissan") with an automatic transmission. She kept it in a garage at the home she shared with her son. Ms. D'Oliveira had her Nissan serviced at Kal regularly in the year or two prior to the accident.
- [10] In the fall of 2005, Ms. D'Oliveira was advised to have her brakes checked when she had her car serviced the following spring. She did not observe any brake fluid leaks on the floor of her garage. She took her Nissan to Kal for servicing on May 25, 2006. The invoice relating to the work refers to installing two wheel cylinders, "brake fluid flush", and "wynns two litre dot 4 brake fluid". The mileage recorded on the servicing invoice was 94,008 kms.
- [11] Kal's records did not enable it to confirm which of its employees actually performed the work on the Nissan's brakes. Its records suggest that Mr. Chiu initially commenced the work. He had no recollection of the work and could not confirm that he completed the work. He may have asked another employee to do so.
- [12] Mr. Chiu testified that in 2006 Kal used a hand pump system for bleeding brake lines, which was not as consistent as the wynns system that the defendant began using in 2007.

[13] There was no brake maintenance performed on the Nissan between May 25, 2006 and the time of accident. The only change in the Nissan's performance which Ms. D'Oliveira noticed between the servicing and the accident was that the hand brake was very tight. She did not see the brake fluid indicator illuminate.

(b) The June 5, 2006 Accident

[14] Ms. D'Oliveira drove her Nissan to a hair salon near the intersection of Kingsway and Aberdeen in Vancouver, B.C. on June 5, 2006. She estimated that she slowed or braked about 13 times along the way. The brake functioning seemed normal to her.

[15] At about 2:00 p.m., Ms. D'Oliveira began her journey home. She travelled north on Boundary Road in Vancouver on a downhill grade. As she approached Moscrop Street, she tried to stop. She found that the brakes did not respond when she depressed the brake pedal. She tried pumping the brakes. The pedal went to the floor but the brakes still did not respond. She considered that the brakes went from 100 percent to zero.

[16] Fortunately, the light turned green and she continued through the intersection. She steered her car to the right because she wanted to stop the vehicle without injuring anyone. She remembers steering the Nissan to the right curb, and her memory fails at that point. She did not try using the hand brake because she was afraid of being hit by a vehicle behind her.

[17] Ms. D'Oliveira's Nissan came to rest when it smashed into a lamp standard at the intersection of Boundary Road and 29th Avenue. The force of the collision caused extensive damage to the Nissan.

[18] Ms. D'Oliveira has no recollection of hitting the lamp standard. Her first memory following the accident is of having difficulty breathing.

[19] Ms. D'Oliveira was taken to Vancouver General Hospital and was admitted to the trauma unit. She was diagnosed as having a fracture to her C-7 vertebra, ten fractured ribs and a crushed right heel. She had surgery on her heel, involving the insertion of pins, and the application of a plaster cast almost to her knee. Her neck was put in a neck collar.

(c) Following June 5, 2006

[20] Ms. D'Oliveira remained at Vancouver General Hospital for 14 days, after which she was transferred to Bradden Private Hospital for transitional care. She stayed there for 38 days. She spent a total of 52 days in a hospital setting before she was discharged home in around August.

[21] The pins and the plaster cast were removed from Ms. D'Oliveira's heel after seven weeks. She was fitted with an air boot which was removed on her discharge from Bradden Hospital. Ms. D'Oliveira's ribs had healed by that time. The neck collar was removed. She was discharged using a wheel chair.

- [22] By the time she was discharged home, Ms. D'Oliveira was essentially pain -free, although she was reluctant to move her neck quickly for fear of pain or injury. Her home was modified with bathroom grab bars and a tub chair for her return.
- [23] Shortly after she left Bradden Hospital, Ms. D'Oliveira was able to walk with the aid of a walker.
- [24] Ms. D'Oliveira's family assisted her to live on her own, particularly in the summer when her sister stayed with her.
- [25] In about February 2007, Ms. D'Oliveira resumed her activities of attending bridge club and church and walking her granddaughter to school.
- [26] Ms. D'Oliveira continued to use the walker or a cane until the spring of 2007, when she was able to walk un-aided.
- (d) At trial
- [27] Ms. D'Oliveira's rib injuries have healed. She does not have any pain associated with her neck, although she is cautious about turning it. Her right ankle remains swollen and she continues to wear wide shoes to accommodate the swelling. She is less confident of her balance than she was prior to the accident. She has occasional heel pain.
- [28] Ms. D'Oliveira no longer attends stay-fit classes owing to her insecurity in using her right foot. She requires assistance with her shopping.

Expert Evidence

(a) Dr. Golin, Treating Family Doctor

- [29] Ms. D'Oliveira's attending family physician, Dr. Golin, provided a report dated June 19, 2008. He wrote that her present condition and prognosis were as follows:

Present Condition - the patient has fully recovered from all of her injuries without any remaining partial or total disability. She has no pain in her ribs or neck, and no pain in her right foot and heel. She has no remaining leg swelling and is able to walk without any difficulty. There is no limp. The patient is emotionally and mentally well without any anxiety or depression. She is not taking any medication, does not require any special shoes or compression hose, and is not seeing any physical therapist such as physiotherapy or occupational therapy.

Prognosis - Lily's prognosis is excellent. As mentioned, she has fully recovered from all of her injuries. I do not expect any future problems in her ribs or neck due to her fractures in those areas. Lily's fractured heel has fully recovered. Prognosis for this fracture is also excellent. The fracture itself should remain healed without any future problems. However, there is a small possibility that over the next 5 to 10 years she may develop some degenerating arthritis in her ankle and foot. Because her injury has occurred at her present age, it is likely that the amount of arthritis that she would develop would be small and would not significantly affect her functioning.

The patient will not require any further follow-up with any surgeon or any other physicians. She will not require future medications or physiotherapy. She will not require any compression hose or water pills and will not require any special shoes or footwear.

The patient has been instructed to remain active without any restrictions, and will follow-up with myself only if she develops problems.

(b) Engineering and Automotive Expert Evidence

i) Robin Brown, P. Eng.

[30] Mr. Brown testified on behalf of Ms. D'Oliveira. He is a licenced professional engineer and was qualified as an expert in the operation of automotive brake systems.

[31] Mr. Brown conducted a physical inspection of the Nissan on October 17, 2006 and provided a written report dated November 7, 2006. He examined the hydraulically actuated braking system and the master cylinder. He did not observe any damage, although on his inspection both front and rear fluid reservoirs were empty with only some contaminants in the bottom of the reservoirs.

[32] Mr. Brown also inspected the wheel end of the braking system, including the brake calipers, rotors, pads, drums, wheel cylinders, shoes and brake lines. He did not find any indications of leakage of fluid in the front wheels or at the brake line connections. He observed that the bleed screws on each front caliper did not exhibit wrench marks and were covered with a significant amount of road grime similar to that of surrounding equipment.

[33] Mr. Brown also inspected the rear wheels and saw the new wheel cylinders on both rear wheels. He observed that the bleed nuts on the rear wheels appeared to be new, and looked significantly different from the bleed screws on the front wheels. Those on the rear had virtually no grime covering them.

[34] In Mr. Brown's written report, he wrote as follows:

The fluid levels in the master cylinder would suggest that the master cylinder reservoirs had not been topped up after the rear wheel cylinders had been replaced. The depleted and reduced fluid levels would allow air to be drawn into the hydraulic system with each application of the brakes. Over a short period of time, sufficient air would be drawn into the system such that insufficient brake pedal travel would be available to the driver to produce any braking force. This would be consistent with the driver's perception of complete brake failure.

[35] Mr. Brown confirmed at trial that this was his opinion. However, the focus of his testimony at trial was the fact that the front bleed screws not only did not exhibit wrench marks, but also exhibited significant road grime, suggesting that they could not have been opened 11 days before the accident when Kal performed the brake servicing.

ii) Ted Semeniuk

- [36] Mr. Semeniuk was qualified to give evidence on the repair, servicing and mechanical inspection of automobile brake systems, and in failure analysis of vehicle mechanical systems, including brake systems. He signed a report dated March 27, 2008 ("Samac Report") on the letterhead of Samac Engineering Ltd., which was also signed by Mr. MacInnis, P. Eng. The Samac Report was tendered into evidence by Kal.
- [37] The plaintiff objected to the admissibility of the Samac Report on the basis that it was a joint report and not in compliance with Rule 40A. Mr. Poston, counsel for Ms. D'Oliveira, referred to several cases, including *Emil Anderson Construction Co. Ltd. v. British Columbia Railway Company* (1987), 15 B.C.L.R. (2d) 28, [1987] 5 W.W.R. 523, *Heidebrecht v. Fraser-Burrard Hospital Society*, [1995] B.C.J. No. 2996, 15 B.C.L.R. (3d) 189, and *Dhaliwal v. Bassi*, 2007 BCSC 548, 738 B.C.L.R. (4th) 170. Following an adjournment, the Samac Report was annotated with highlighting demonstrating which parts were primarily based on Mr. Semeniuk's work and which were based on Mr. MacInnis's work. The Samac Report was admitted into evidence in that form.
- [38] Mr. Semeniuk was not given the opportunity to examine the Nissan. Among the materials he reviewed was Mr. Brown's report. Mr. Semeniuk noted that for the servicing described in the invoice, the only areas of the brake system which would necessarily have been touched were the brake system components at the two rear wheels, the front brake bleed screws, and the reservoir of the brake master cylinder. Mr. Semeniuk noted that to perform the invoiced work, the service people would not have been required to touch the master cylinder/vacuum cylinder/brake pedal components, the front brake components, or the brake line between the master cylinder and the four wheels. Mr. Semeniuk also provided information about how certain failures would have occurred.
- iii) Steve MacInnis, P. Eng.
- [39] Mr. MacInnis was qualified as an expert in the area of design, operation and analysis of automobile brake systems. He wrote parts of the Samac Report, including portions that depended on Mr. Semeniuk's expertise. Mr. MacInnis was not able to identify, on the basis of his assumptions, anything that would have caused the brake system to suddenly fail completely. He considered a number of possible failures, but was of the opinion that there should have been some warning about any of those problems.
- [40] In Mr. MacInnis's opinion, if the brake fluid was low enough in the rear reservoir, braking the vehicle would have tended to suck air into the brake lines of the circuit. This would have resulted in a spongy feel to the brake pedal. In Mr. MacInnis' opinion, if there was air left in the brake system, the driver should have felt a problem with the brake pedal immediately after it was serviced.

Analysis

(a) Liability

- [41] Ms. D'Oliveira was an impressive witness. She was frank, articulate, and did not exaggerate. I have no hesitation in accepting her evidence that the brakes suddenly failed at the time of the accident.
- [42] The fact that there was a sudden brake failure is unusual, and the experts struggled to explain what could have caused it.
- [43] Messrs. Brown, Semeniuk and MacInnis all had impressive credentials. Mr. Brown had the additional opportunity to physically inspect the Nissan. The photographs of his inspection confirm his observation that the front bleed screws were covered with road grime and appeared not to have been disrupted for some time, while the rear ones had been replaced and were covered with virtually no grime. This strongly suggests that the front bleed screws had not been unscrewed, and that Kal therefore did not complete the bleeding of the brake lines on May 25, 2006.
- [44] In the simplest terms, the Nissan's hydraulic braking system functioned in this way. It was designed so that non-compressible brake fluid could be placed in the master cylinder reservoirs so that it would flow along the brake lines. The brake system was designed to be activated by depressing the brake pedal. Doing so was designed to push a rod in the vacuum booster, which in turn, was designed to push another rod connected to a piston in the master cylinder. So long as there was sufficient fluid in the master cylinder reservoirs, pushing this piston should have had the effect of compressing the fluid in the brake lines.
- [45] The effect of the compression of the fluid in the brake lines differed for the front and rear brakes. The front brakes were designed so that a piston would press against disk callipers, thus slowing the vehicle. The rear drum brakes involve the use of a wheel cylinder, which also had pistons. These were designed to press to the brake shoes which themselves would create friction with the wheel and slow the rear wheels.
- [46] With both the front and rear brakes, there is a component called a bleed screw. The term "bleeding" or "flushing" the brake lines refers to pushing what is in the brake lines out the hole which is covered by the bleed screw.
- [47] The fluid in the brake system is susceptible to contamination by air, water, or particles. Contamination by air and water reduces braking function, because air and water are compressible. Contamination by particles presents a risk that the particles will block a seal at some point in the brake line, permitting the entry of air or water or other contaminants through the seal point.
- [48] The process of flushing a brake line is intended to replace what is in the brake line with fresh brake fluid. In general terms, the process consists of introducing fresh brake fluid to the master reservoir, and by applying pressure to the master cylinder connection, forcing the new brake fluid to replace whatever is present in the brake line. This should force old brake fluid, which might be contaminated by air or water or particles, out the bleed screw ports.

- [49] The brake system on the Nissan was a "diagonal" system. That is a system in which one reservoir of the master cylinder feeds the left front and right rear brake line, while the other reservoir feeds the other brake line. The purpose of the diagonal design is so that if there is a failure in one brake line from one reservoir, only two brakes will be affected and they will be on different sides of the vehicle. This is a safety measure designed to assist in avoiding brake failure accidents.
- [50] The rear wheel bleed screws are on the wheel cylinders. Replacing wheel cylinders properly requires bleeding of the brake lines. Performed properly, a brake fluid flush will replace the fluid in the brake lines. If fresh brake fluid was introduced into the master reservoir and not bled through the bleed screws on the two front wheels, the fluid in both diagonal brake lines would not be completely replaced. As a result, any existing contamination, such as air or moisture or particles, might not be removed from either diagonal line.
- [51] The evidence demonstrated on the balance of probabilities that Kal's negligence in servicing the Nissan's brake system caused the brakes to fail. Mr. Brown's physical observations of undisturbed front bleed screws is consistent with a failure to properly perform the brake fluid flush. This would have left existing contaminated brake fluid in the system.
- [52] Ms. D'Oliveira did not notice a change in the brake system functioning after the servicing. The brakes may have been performing poorly before the servicing, which led to the replacement of the rear wheel cylinders. If the brake fluid flush was done incorrectly, brake function would not improve despite the servicing. Alternatively, Ms. D'Oliveira may not have been particularly sensitive to the sponginess of the brakes. While it appeared sudden to Ms. D'Oliveira, the brake system was likely performing poorly even prior to servicing, and there simply continued to be a slow deterioration leading to complete failure.
- [53] As a result, Kal is liable for Ms. D'Oliveira's injuries arising from the accident, and for the sum agreed between the parties in the ICBC Action.
- (b) Non-Pecuniary Damages
- [54] Ms. D'Oliveira suffered significant orthopaedic injuries of ten broken ribs, a crushed right heel, and a fracture to the C-7 vertebra. She had surgery on her heel to insert pins, had a cast on her leg for seven weeks, and was placed in a neck collar. She spent 52 days in a hospital setting. She was discharged using a wheelchair, but shortly afterwards was able to walk with a walker and then a cane. During this time she was assisted in household activities by her son and sister.
- [55] Ms. D'Oliveira was able to walk unaided about nine months after the accident. By that time she was mostly pain-free, and able to resume most of her activities.
- [56] Ms. D'Oliveira's on-going problems are that she is unsteady on her feet. She has given up her regular stay-fit classes. She is more cautious in turning her head. She has to wear wide shoes to accommodate swelling.

[57] Ms. D'Oliveira's position is that an appropriate award of non-pecuniary damages in this case is \$125,000. She relied on these cases: *Easton v. Chrunka*, 2006 BCSC 1396; *Cole v. Smith*, 2002 BCSC 1235, [2002] B.C.J. No. 1913; and *Chu v. Jacobs*, [1996] B.C.J. No. 674.

[58] Kal argued that the appropriate range of damages for Ms. D'Oliveira, bearing in mind the significant orthopaedic injuries, was \$40,000 to \$50,000. Kal relied on these two cases: *McFadyen v. Dean*, 2006 BCSC 779, [2006] B.C.J. No. 1164; and *Harvey v. Swyer*, 2007 NLTD 129, [2007] N.J. No. 249.

[59] I also considered the following cases:

- a) *Turlock v. Easy*, [1992] B.C.J. No. 2657 (S.C.);
- b) *Zeeb v. Purser*, [1988] B.C.J. No. 2246 (S.C.);
- c) *Ralph v. Britt*, [1986] B.C.J. No. 2337 (S.C.)
- d) *Regan v. Howe Holdings*, [1990] B.C.J. No. 299 (S.C.);
- e) *Lepp Estate v. Lepp*, [1989] O.J. No. 1744 (Dist. Ct.); and
- f) *Usher v. Sam*, [1982] B.C.J. No. 465 (S.C.).

[60] No two cases are identical and each will depend on its particular facts. The appropriate award for Ms. D'Oliveira's non-pecuniary damages is \$40,000.

Summary

[61] Ms. D'Oliveira is entitled to judgment against Kal for \$40,995.24 consisting of non-pecuniary damages of \$40,000 and special damages of \$995.24.

[62] ICBC is entitled to damages against Kal in the amount of \$35,000. As agreed, there will be no order as to costs in the ICBC Action.

[63] Unless the parties need to bring an offer to settle to the court's attention, Ms. D'Oliveira is entitled to her costs of the D'Oliveira Action at Scale B, and interest as applicable. If counsel wish to address costs, they should schedule a further hearing through the registry.

"Gray J."

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