

CANADA / JUDGMENT

Delgado v. Parra

2002 BCSC 1345

COURT

Supreme Court of British Columbia

DECIDED

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2002BCSC1345

Citation: Delgado v. Parra et al

Date: 20020924
2002 BCSC 1345Docket: S059489
Registry: New Westminster
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: ANA DELGADO
PLAINTIFFAND: CARLOS PARRA, LOLITA MAY-WHA CHO, AN INFANT
(A PERSON UNDER DISABILITY) KAM CHING CHO
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE DILLON

Counsel for the Plaintiff:

J. Butler

Counsel for the Defendants:

B.T. Lepin

Date and Place of Trial:

March 13, 14, 15,

April 2,3,4,5,2002

Vancouver, BC

Introduction

- [1] The defendants have admitted liability for damages for personal injury caused to the plaintiff as a result of a motor vehicle accident on April 12, 1998. The plaintiff was a passenger in a motor vehicle driven by the defendant, Carlos Parra, when the vehicle was hit on the passenger side as Mr. Parra was turning left at the intersection of Knight Street and 49th Avenue in Vancouver. The main issues are whether the accident caused the plaintiff's right neck pain and continued right shoulder pain and whether the plaintiff is entitled to future loss as a result.

Prior to Motor Vehicle Accident

- [2] The plaintiff moved to Canada from Chile in 1979 with a grade 8 education. She was a housewife for many years but personal circumstances forced her to gain employment as a room attendant at the Hotel Vancouver in late 1989. She remained at that hotel until 1991 when she transferred to the Fairmont Waterfront Hotel where she remained employed until February 18, 2002.
- [3] In September 1991, the plaintiff injured her right shoulder at work. Although she continued on in pain with her duties as a room attendant for quite awhile, the pain worsened and the plaintiff was unable to work from September 1992. Dr. Regan, an orthopaedic surgeon, attempted to manage the rotator cuff tear through conservative means for several years before he decided to perform surgery in January 1994. The plaintiff had a prolonged recovery and still had difficulty raising her arm above her head five months post surgery. Dr. Regan thought that she had developed an overuse tendonitis aggravated by overhead activities at work. Although the plaintiff eventually returned to work in June 1994, the Workers' Compensation Board ("WCB") concluded that the plaintiff had been left with some (5 percent) permanent impairment and disability that would preclude her from work involving repetitive overhead activity and heavy lifting. Because the plaintiff was unable to return to the heavier duties of a room attendant, the hotel created a job for her as a runner or houseperson. Notes at the time indicate that Ms. Delgado was unable to lift more than 30 pounds or do repetitive tasks.
- [4] By 1995, her general physician, Dr. Carvalho, reported to WCB that there was still constant discomfort in the shoulder that varied with the intensity of activity and that there was also pain at the base of her neck on the right side. In December 1995, the plaintiff was off work for three weeks due to stress and depression. WCB reports in 1996 also described continuing pain in the plaintiff's right shoulder that prevented her from lifting her right arm, maintaining sustained shoulder muscle activity, or sustained pressure. Dr. Carvalho reported episodes of severe pain in her right shoulder in May 1996. Dr. Regan testified that these muscles involved the rotator cuff and that tendonitis can easily flare up. The intensity of the pain depended on the strenuousness of the work activity.

- [5] Ms. Delgado's job duties were further modified in 1996 as she was required to deliver and set up cribs and cots. A physiotherapy assessment had been done to define the activities that the plaintiff could do. At that time, her right shoulder movement was limited to the extent that she could not lift her arm above her shoulder. She could not perform sustained right shoulder muscle activity. However, with correct technique, she could manage to set up cribs and move furniture as part of a team. Ms. Delgado regularly took one or two days off because of pain or stress, usually taking a vacation day.
- [6] The plaintiff said that her right shoulder pained her once in awhile prior to the accident depending on what she was doing; however, she did not consider this to be a major problem. She also admitted in cross-examination that her right neck muscles also hurt at times which she associated with her right shoulder.
- [7] Dr. Carvalho, the plaintiff's family physician, confirmed that any neck pain prior to the accident was associated with the right shoulder. In a report to workers' compensation five weeks before the accident, the doctor described chronic pain in the right shoulder which he considered likely to be of a permanent nature. It was expected that the plaintiff would have to work with difficulty and in discomfort from time to time as a result of this condition.
- [8] The plaintiff was an active mother prior to the accident. She loved to dance, play soccer, and garden.

The Accident

- [9] The plaintiff was a passenger in a left-turning vehicle driven by Carlos Parra when she was struck on the passenger side of the vehicle by a car going through the intersection on April 12, 1998. The plaintiff was wearing her seatbelt. It was a significant collision. The glass windshield shattered and the jaws of life were required to remove Ms. Delgado from the vehicle. The plaintiff was taken to hospital by ambulance but was released after a few hours and advised to contact her family doctor.

Post Accident

- [10] Immediately after the accident, Ms. Delgado was bruised on the right side of her body, crying, sleepless and upset. She had headaches and dizziness. She said that she started feeling "a little bit more pain" in her right shoulder immediately after the accident, along with pain in her back, chest, right hip, legs and jaw. She testified that the whole of her right side was in constant pain. Her hearing was sensitive for two weeks. She could not eat because of pain in her jaw. She had difficulty walking for two weeks and required personal care from her daughter. She became irritated, moody and frustrated.
- [11] The plaintiff attended to her family physician two days after the accident. Dr. Carvalho diagnosed the plaintiff as having sustained a moderately severe neck injury suggestive of a whiplash, moderately severe strain of upper and lower back, and soft tissue injury with bruising to the right and left thighs and knees. She had contusion injuries on her chest,

shoulder joints, right clavicle and right elbow, and right and left temporomandibular joints. She had dizziness and headaches. He thought that she was recovering from a state of severe shock.

- [12] Dr. Carvalho saw the plaintiff regularly during the period leading to his first report of August 24, 1999. His findings were consistent throughout this time. There was mild spasm over the right para-cervical area and mild tenderness over the third and fourth cervical spines. There was mild spasm over the right paravertebral muscles and mild tenderness over the fifth and sixth dorsal spines. There was restriction of movement and tenderness in the right shoulder. There was tenderness in the chest. The temporomandibular joints exhibited restriction of movement, tenderness, and palpable clicking. By August 1999, Dr. Carvalho thought that there had been improvement with continuing physiotherapy. Ms. Delgado was still symptomatic and required periodic days off work. He said that Ms. Delgado was completely disabled for nineteen weeks. He considered that she would have residual discomfort, but not disability, for an indefinite period. The neck, shoulder, temporomandibular joint, and back pain and discomfort was expected to linger but not permanently. The left back pain had resolved shortly after Ms. Delgado returned to work in September 1998. Dr. Carvalho also thought that Ms. Delgado suffered from post traumatic stress syndrome secondary to the accident and had prescribed medication for depression related to this condition.
- [13] Dr. Carvalho said that the aggravation of the plaintiff's right shoulder injury from the accident had resolved by August 20, 1998 so she would have been able to return to work but for the other accident injuries. In fact, the plaintiff returned to full time work in September 1998.
- [14] Dr. Carvalho referred the plaintiff to her dentist for the pain in her jaw and teeth. Her dentist referred her to Dr. Blasberg, an oral medicine specialist, who saw the plaintiff on October 28, 1998. At that time, she had pain in front of the ear and jaw area, headaches, clicking of the jaw, and difficulty chewing food. Dr. Blasberg found an irregularity in the right temporomandibular joint and myofascial pain of the masticatory muscles on the right side. This restricted the range of movement. Following a normal MRI result, he recommended physiotherapy and an appliance. After two months, the jaw pain was intermittent but the plaintiff still had trouble chewing food. She continued with an oral appliance, wearing it sixteen hours a day by August 1999. Dr. Blasberg reported that there was improvement by October 1999 but still intermittent pain. By January 2000, the headaches had ceased and symptoms were decreasing with some flare-ups. By January 2001, Ms. Delgado had ceased to wear the appliance and could chew without pain. Improvement continued through June 2001 and although headaches continued, these were thought to be related to her neck. Treatment was discontinued. There was another flare-up in December 2001 with headaches and pain that required wearing the appliance again. She was advised to use the appliance as much as possible and to use self-help measures. Dr. Blasberg said that the temporomandibular disorder was caused by the motor vehicle accident.

- [15] Dr. Blasberg saw the plaintiff again on March 1, 2002 to reassess her temporomandibular problem. Headaches had continued with pain in the jaw and difficulty chewing. Improvement in range of motion was noted. Ms. Delgado was advised to continue wearing the appliance as often as she could during the day. Dr. Blasberg was unable to identify any factors that could have caused this exacerbation of injuries to the plaintiff's jaw. He said that the plaintiff had increased symptoms after she reported having fainted and fallen. She continued to use the appliance at the time of trial. Dr. Blasberg expected that the plaintiff would eventually recover but could not give an exact prediction as to when. He thought that it would take at least twelve months. He said the flare-ups were expected on the normal road to recovery. The anticipated cost of treatment over the next twelve months was \$600 at a minimum, excluding the costs of physiotherapy.
- [16] After three years when the plaintiff's complaints continued, Dr. Carvalho referred the plaintiff to Dr. Hershler, a specialist in physical medicine and rehabilitation. He saw Ms. Delgado on two occasions, June 14, 2001 and January 2, 2002. In 2001, Ms. Delgado was still experiencing persistent pain and clicking in the right hip, headaches once a week, and neck pain. Her complaints were confined to the right side. Dr. Hershler diagnosed right sided injury to the upper cervical spine, myofascial pain, mechanical injury to the pelvis causing pain in the hip joint, and probable re-aggravation of a pre-existing injury affecting the right shoulder. When seen in 2002, Ms. Delgado complained mainly of neck pain. She told Dr. Hershler about falling down some stairs. The doctor found some improvement but there remained soft tissue pain in the right hip and buttock and malalignment of the cervical spine. Based upon the history taken, including no prior history of neck or spinal pain, Dr. Hershler concluded that all of the injuries were caused by the April 12, 1998 accident. Prognosis was guarded. He considered the time lost from work appropriate for the nature of the injuries suffered by Ms. Delgado. She is unable to put repetitive loads on the neck or upper body and cannot handle physical lifting or carrying on a prolonged, repetitive basis. Dr. Hershler concluded that specialist chiropractor treatments were required for a further six months. If this proved unsuccessful, then pulse signal therapy was a possibility. This is administered by Dr. Hershler during nine one hour treatments over a two week period and costs \$3,000.
- [17] Dr. Carvalho continued to treat the plaintiff throughout this time. In March 2001, the plaintiff complained for the first time of her right shoulder "popping out". In April 2001, Dr. Carvalho wrote to her employer that she should not lift heavy items due to her weakened right shoulder joint.
- [18] In August 18, 2001, the plaintiff fainted and fell down the stairs at her home. She was off work until October 2001. A short term disability claim was filed which indicated that the fall was due to stress and anxiety unrelated to the April 12, 1998 accident. Dr. Carvalho diagnosed the plaintiff with acute panic attack, stress, anxiety and depression due to employment. The plaintiff described only right hip and right shoulder pain before this incident and also said that headaches, neck pain, and other soft tissue damage resulted from

this incident. She explained that this was an aggravation of her previous injuries.

- [19] Dr. Regan examined Ms. Delgado on September 17, 2001 for purposes of a medical-legal report. He was aware of the April 12, 1998 accident and of the plaintiff's attempted return to work. Following examination and history review, Dr. Regan diagnosed the plaintiff with post-traumatic paraspinal muscle pain, trapezial pain, and possible re-injury of the rotator cuff. He concluded that the jarring sensation of the motor vehicle accident aggravated the plaintiff's pre-existing shoulder condition. Other tenderness reported by the plaintiff was not related to the rotator cuff. Dr. Regan maintained this view in cross-examination. The defence did not refute Dr. Regan's evidence.
- [20] Dr. Carvalho reported again on January 7, 2002. The plaintiff had continued to see him regularly throughout this time. It was apparent that things had not worked out as the doctor had so positively anticipated in his August 1999 report. The doctor reported that the initial complaints had been of severe pain and stiffness in the neck, moderately severe pain and discomfort in the back, moderate pain in both shoulder joints, pain in the chest and temporomandibular joint, and bruising. He diagnosed a moderately severe neck injury and moderately severe strain of the upper and lower back along with contusions to the both shoulders, both temporomandibular joints, right clavicle, right elbow, both knees, and both thighs. He said that her complaints remained consistent with slow overall improvement in between periods of aggravated pain from strenuous work activity and weather. There were periods when the plaintiff was better. He was aware of two work related injuries in the interval between the accident and his report which he said did not affect her present state of disability. At the time of the report, her condition was stable with moderate pain in the neck, back, shoulder, temporomandibular joint, right hip and left knee, fluctuating from time to time to severe pain. She continued to experience severe pain at times in the right hip. Her overall mental state was characterized as post-traumatic as she remained tense, anxious, unable to focus, still with flashbacks to the accident. The length of partial disability was in doubt but Dr. Carvalho did not expect that it would last more than another year. Dr. Carvalho expressed no doubt that her injuries were caused by the accident. In cross-examination, he said that the fall down the stairs in August 2001 did not cause her present injuries.
- [21] Dr. Carvalho suggested that the plaintiff's injuries, along with the nature of her employment, could lead to a less physically demanding job. However, he expressed this as a possibility. In a January 2002 report for workers' compensation, Dr. Carvalho expressed the opinion, confirmed in cross-examination, that the plaintiff could eventually return to her pre-accident modified employment. This meant that she should avoid overhead activity and lifting, the same situation that existed prior to the accident.

- [22] The chiropractor who treated the plaintiff from March to December 2001 also testified. He found that the plaintiff's main problems were her neck and lower back. He said that the plaintiff's pain was now chronic and that it could be expected to last for two to five more years. He was not aware of the plaintiff's history prior to the accident.
- [23] At the time of trial, Ms. Delgado's jaw was only occasionally painful. The real pain had lasted for a year and then subsided except for when she opened her mouth too wide. She still wears her appliance at night. Her neck remains the most significant area of pain for which she takes muscle relaxants. She continues to have pain and a click in her hip when walking for long periods. The plaintiff also said that she still experiences pain in her back although it is getting better. The right shoulder hurts "a little bit" once a week. Her headaches average twice weekly but are progressively getting better. She continues to take medication to sleep every second night.
- [24] The plaintiff still receives physiotherapy and chiropractics. She has restricted her gardening, soccer and dancing activities, although the present extent of the restriction was not exactly clear. By March 1999, she was able to work in the garden for six interrupted hours. She was out dancing at least every three months by July 2000. Her marital relationship has suffered as a result of the accident.
- [25] The plaintiff was off work for four months after the accident. She then returned part-time and resumed full time in September 1998. She returned to doing cribs and cots for two years, albeit with difficulty at times. Dr. Carvalho thought that she had returned to work too soon. She complained to her employer repeatedly about her difficulty with cribs in the spring of 2000. There had been no complaints prior to the accident. Arrangements were made for her to have assistance. The plaintiff injured her left mid-back at work in December 2000 and was absent for eighteen days. Dr. Carvalho described this as a simple strain. It resolved with physiotherapy. The plaintiff attributed her shoulder "popping out" in March 2001 to this injury as she was compensating for her sore back in her movements.
- [26] Eventually, the plaintiff complained to her supervisors in April 2001 that she could not do the cribs and cots. Although the plaintiff said that she told them that she could not do so because of pain throughout her right side, the medical note from Dr. Carvalho that she gave to her employer to support her position referred only to right shoulder pain. The executive housekeeper testified that Ms. Delgado complained that she was unable to do the cribs because of her right arm and back. Her job description changed to delete responsibility for cribs and cots. This caused problems with the housemen who had to take over this duty. The plaintiff did, however, continue to do cribs sometimes but the complaints persisted until a meeting occurred in May 2001 with the plaintiff's manager. Ms. Delgado was told of continuing complaints about her inability to do the cribs. The stress of this meeting led to the plaintiff fainting in the lunchroom later that day. A period of uncertainty followed at work as the responsibility for cribs was sorted out. The plaintiff was eventually assigned to take care of the public washrooms instead of the cribs. This caused her considerable upset. She fainted on August 18, 2001, this time falling down the stairs in her house. Both the

plaintiff and Dr. Carvalho attributed this fall to stress from the pressures and challenges at work.

- [27] When the plaintiff returned to work in October, 2001, her employer laid her off for unrelated reasons. On February 18, 2002, she was told that her position was terminated for reasons unrelated to Ms. Delgado. She had been earning \$32,606 per year.
- [28] The plaintiff has not attempted to secure work in the hotel industry since then because she considered that nobody would hire someone with so many problems. She said that she would not be able to do the job of runner. She plans to improve her English to obtain employment as a counsellor or interpreter. This requires an upgrade to grade twelve English. There is no evidence of an assessment to determine the present level of Ms. Delgado's English skills to determine whether this option is feasible in light of her limited education. The only evidence, apart from her testimony in English, is that the plaintiff required the assistance of her daughter to fill in a disability claims form in English. There is no evidence that the plaintiff has attempted to secure other work.

Non-pecuniary Damages

- [29] The plaintiff seeks general damages in the range of \$45,000 to \$80,000 based upon a conclusion that the plaintiff has suffered a permanent partial disability. The defendant says that the appropriate range is \$20,000 to \$25,000 for resolved soft tissue injury.
- [30] The plaintiff suffered a moderate to severe neck injury and moderately severe strain of the upper and lower back. There was also soft tissue injury to the knees and thighs and contusion injury to the chest, shoulders, right clavicle, right elbow and temporomandibular joints. She was able to return to full time work after four months but with considerable difficulty. She had post-traumatic stress. Her symptoms have continued to flare up four years after the accident with varying degrees of severity, depending on the plaintiff's activities. She continues to take medication for pain, wears an oral appliance, receives physiotherapy and chiropractic treatment, and regularly visits her general practitioner.
- [31] Her headaches and other symptoms persisted such that she was referred to an oral medicine specialist six months after the accident. She still is in treatment for the temporomandibular joint problem and she experiences headaches, pain and difficulty chewing. These are related to the accident. I reject the defence claim that recent symptoms were caused by the fall down the stairs and are therefore unrelated to the accident in 1998. As Dr. Blasberg stated, the plaintiff can expect flare-ups in her symptoms from time to time. She has been diligent in her own care and is expected to eventually recover in another year.
- [32] The plaintiff was eventually referred to a specialist in physical medicine and rehabilitation when her symptoms were still aggravating after three years. There was pain in the hip, headaches and neck pain. I conclude that the neck pain was caused by the accident and is not inextricably related to the prior shoulder condition. Dr. Hershler observed physical malalignment of the cervical spine that he concluded was caused by the accident. I do not

find that Dr. Hershler's opinion is to be discounted because of any errors in the history that he received. The plaintiff's neck pain prior to the accident was related to the shoulder injury of which Dr. Hershler was aware. It was not a separate prior injury. The recounting of overtime worked prior to the accident was not a significant factor in Dr. Hershler's opinion. Dr. Hershler was a careful, practical witness whose opinion I accept.

- [33] I also accept the testimony of the plaintiff as to the nature and severity of her injuries. I do not find that she exaggerated her pain. She did, however, tend to confuse the areas of pain as it related to her right shoulder and neck. This is a natural confusion given the nature of her injuries. The medical evidence helped to sort this through. Dr. Carvalho found the plaintiff's complaints to be consistent whenever he saw her, which was frequently throughout this period.
- [34] Dr. Regan saw the plaintiff in 2001 specifically to re-examine the shoulder that he had treated for many years. He concluded that the accident had aggravated the shoulder. In addition, he found post-traumatic paraspinal muscle and trapezial pain. His opinion supports the other medical views of the plaintiff's continuing symptoms. With respect to continuing problems with the shoulder, Dr. Carvalho said that the aggravation caused by the accident resolved by August 1998. However, there continued to be shoulder problems. Drs. Regan and Hershler attributed continuing aggravation of the shoulder to the motor vehicle accident. Based upon the plaintiff's present symptoms, I conclude that the shoulder aggravation caused by the accident has resolved so that the plaintiff is now left in her pre-accident state of continuing disability from this shoulder.
- [35] The defence did not lead any medical evidence to refute the opinions of these doctors. Nor were these opinions significantly undermined upon cross-examination. I do not find that the fall down stairs in August 2001 was the cause of her present complaints. At this time, it is expected that the plaintiff will continue to experience symptoms from the accident for at least two more years. The injuries are not expected to result in permanent disability. In these circumstances, non-pecuniary damages are assessed at \$50,000.

Wage Loss and Special Damages

- [36] The parties agreed that the past net wage loss is \$6,520.42. This represents lost wages from April to September 1998.
- [37] Special damages have been agreed at \$4,651.36.

Future Care Costs

- [38] There is evidence that the plaintiff will require continuing care over the next few years. I do not find that the defendants have proven that the future care is required because of the fall down the stairs. It is directly related to the accident of April 1998. These costs include the chiropractic treatments recommended by Dr. Hershler. The estimated cost of these treatments over six months is \$720. Dr. Hershler also said that if these were not successful, it

was reasonable that the plaintiff receive pulse signal therapy which would cost \$3,000. Based upon the plaintiff's history of recovery and the failed expectations of doctors to date, it is a reasonable expectation that this therapy will be required. There is also the costs of continuing treatment with Dr. Blasberg estimated at \$600. Future care costs are assessed at \$4,320.

Future Loss of Income

[39] Dr. Hershler said that the injury to the plaintiff's cervical spine and neck would continue to affect her ability to carry and lift. It was apparent that this restriction affected her ability to do the cribs in her employment as a runner at the hotel. Her ability was, however, also affected by her previous shoulder injury. Although the plaintiff was able to work with difficulty for several years with these injuries, they are debilitating and constitute a limiting disability for which the plaintiff is entitled to compensation. While the shoulder injury was aggravated in the accident, it has now resolved. The plaintiff's present major complaint relates to the back and neck. I do not conclude that it is the previous shoulder injury that will be the sole cause of the plaintiff's continuing work limitation. Appropriate compensation for the future loss of capacity is based upon two years wage loss and is assessed at \$65,000.

[40] The plaintiff has not proven that retraining as a counsellor or court interpreter is a realistic possibility in the future. The plaintiff's English skills are not proven to qualify her for any of the training. There was no evidence as to how long it might take to upgrade to the level required. There was no evidence that the plaintiff had made any effort to upgrade her English or general education. The evidence was that the plaintiff could not fill in her own medical claim form. In these circumstances, I decline to award anything for future retraining as requested. The plaintiff should be able to return to her pre-accident abilities within three years. She has considerable experience in the hotel industry which should enable her to obtain employment in that field.

Conclusion

[41] The plaintiff is awarded \$50,000 in non-pecuniary damages, \$6,520.42 for past wage loss, \$4,651.36 in special damages, future care costs of \$4,320, and \$65,000 for future lost income. The plaintiff is entitled to costs on the scale of 3, although counsel may wish to speak to this matter.

"J.R. Dillon, J."

The Honourable Madam Justice J.R. Dillon

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