
CANADA / JUDGMENT

Duley v. Friesen

2007 BCSC 1723

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1723 Duley v. Friesen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duley v. Friesen,

2007 BCSC 1723

Date: 20071129

Docket: M060746

Registry: Vancouver

Between:

Veerpal Kaur Duley

Plaintiff

And:

Natalija Friesen, Wescott Lauren Friesen, Ryan Bruce

Ballard, Ford Credit Canada Leasing Company / Compagnie

de Location Credit Ford Canada, William Phelps and

Adams & Phelps Reporting & Video Ltd.

Defendants

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiff

Robert C. Marcoux

Counsel for the Defendants

Katherine Chong

Danielle Poulin

Date and Place of Trial:

July 30-31, August 1-3 and 24, 2007

Vancouver, B.C.

- [1] The plaintiff, Veerpal Duley, claims for damages arising out of a motor vehicle accident that occurred on June 6, 2004. Liability is admitted by the defendants Natalija Friesen and Westcott Lauren Friesen. The sole issue is the quantification of damages.

Background

- [2] At the time of the accident, Ms. Duley lived in Surrey with her husband, their three young children, her mother-in-law, father-in-law, sister-in-law, niece and nephew. It was a "very traditional" East Indian home with each family member contributing to the welfare of the whole. Ms. Duley was, by all accounts, the central figure in the home as she was primarily responsible for cooking, cleaning and other household duties.
- [3] Since the accident, there have been two significant changes in the family. Ms. Duley's husband was killed in a trucking accident that occurred on December 30, 2004. Just before the conclusion of trial, Ms. Duley's mother-in-law, who required a tremendous amount of daily care, passed away.
- [4] In the accident, Ms. Duley's car was rear-ended. There was minor damage to her vehicle. She went to her family doctor the day after the accident and was diagnosed with a soft tissue injury. It is now more than three years since the accident and she continues to complain of pain in her neck, back, shoulder and right arm. She complains that she has difficulty performing many activities that she is required to do on a daily basis to look after the home and the family. She also says that she will be unable to return to work, which she would have done but for the accident. In addition to her claim for non-pecuniary damages and past wage loss, she advances claims for past and future loss of housekeeping capacity, future loss of earning capacity and future care.
- [5] The defendants admit that Ms. Duley had a soft tissue injury but say that it is now resolved. They also say that many of her complaints are related not to the accident but rather to pre-existing injuries. They deny that her loss of functional capacity was caused by any injury that she received in the accident and deny any claim for future loss.

Issues

[6] The issues are as follows:

A. What is the nature, extent and duration of the injuries caused by the accident?

B. What damages is Ms. Duley entitled to given the nature, extent and duration of the injuries caused by the accident?

Issue A. What is the nature, extent and duration of the injuries caused by the accident?

[7] This issue requires a consideration of the medical evidence as well as an assessment of the evidence of Ms. Duley. The question is complicated by significant disagreements between the physicians regarding the cause of her symptoms and by the unreliability of her evidence regarding the progression of her condition and the nature of her pre-existing problems. To determine the nature, extent and duration of her injuries, I will separately examine the evidence in relation to the three alleged areas of injury: neck and back, right shoulder and right arm.

(a) Neck and Back

[8] Ms. Duley saw Dr. Aulakh, her family doctor, on June 7, 2004, the day after the accident. He was not called as a witness, but his records were tendered along with an agreed glossary of the abbreviations he used in his notes. A medical report that he prepared for the Insurance Corporation of British Columbia ("ICBC") dated September 13, 2004 indicates that he diagnosed Ms. Duley as suffering from an acute neck and low back strain. He saw Ms. Duley three times during that period. He reported that she was not disabled from work during that time and that she had no periods of total disability, although she did have a partial disability for approximately 14 weeks.

[9] Dr. Aulakh also prepared a report dated January 12, 2007 which summarizes Ms. Duley's complaints and his treatment and diagnosis. His diagnosis as of that date was that she suffered soft tissue injuries to her neck and low back and that she was recovering very slowly. In spite of the slow recovery, he was of the view that her prognosis remained good and full recovery was expected.

[10] Dr. Aulakh referred Ms. Duley to a chiropractor, Dr. Sidhu, who gave evidence at trial. He saw Ms. Duley 14 times between June 15, 2004 and August 24, 2004, the last time that Dr. Aulakh saw her before his report of September 13, 2004. Dr. Sidhu testified that Ms. Duley complained of bilateral neck pain which became more focused on the right side as well as low back pain on the right side. By August 24, 2004 she indicated that the condition was improving and that the pain would come and go. Overall she indicated that the pain in the right lumbar and right cervical regions was better.

- [11] Dr. Sidhu continued to see Ms. Duley until June 2005. The nature of her complaints changed somewhat after October 2004 when she began to work at a chicken factory. However, her main complaints of pain in the upper cervical and trapezius regions continued throughout her visits to Dr. Sidhu. At the conclusion of the visits, Dr. Sidhu was of the opinion that her prognosis for a full recovery remained good.
- [12] The plaintiff also called Dr. Adrian, a physiatrist who saw Ms. Duley on May 25, 2007 for the purpose of a medical assessment. He concluded that she probably suffered an injury to the musculoskeletal structures of the neck and lower back as a result of the accident. He was unable to provide an opinion as to what structures were injured. His conclusion was based, in part, on Ms. Duley's assertion that she had not experienced physically limiting symptoms prior to the accident and had experienced persisting pain since the accident. Given the length of time since the accident he felt that her prognosis for recovery was poor.
- [13] Prior to seeing Dr. Adrian, Ms. Duley's counsel referred her to Dr. Feldman, also a physiatrist, for an independent assessment on February 1, 2007. However, Dr. Feldman was called as a witness by the defence. Dr. Feldman was of the view that Ms. Duley had a soft tissue injury and that she suffered from a mild myofascial pain syndrome in her posterior neck and at the insertion of the lumbar paraspinal muscles on the sacrum. He was of the view that the pain had been reduced substantially from its onset. His prognosis was that she could expect complete resolution within three to six months of beginning treatment. He was of the view that physiotherapy was the treatment of choice. Ms. Duley was subsequently referred to Moez Dhanji for physiotherapy.
- [14] Mr. Dhanji gave evidence that he treated Ms. Duley from May 31, 2007 to July 13, 2007. He testified that Ms. Duley told him that her pain symptoms improved by 30 to 40% in that period of time. Mr. Dhanji was of the view that if Ms. Duley had persisted with the physiotherapy treatments there was a high probability that her injuries would resolve. He noted that she had missed 5 out of 21 appointments. For reasons that were never explained at trial, Ms. Duley was instructed (apparently by her lawyer) not to continue with the physiotherapy treatments. Accordingly, we do not know if the balance of her pain symptoms would have disappeared with a continuation of the treatment.
- [15] Dr. Schweigel, an orthopaedic specialist, gave evidence on behalf of the defendants. He saw Ms. Duley for an independent assessment on January 30, 2007. He was of the opinion that she sustained soft tissue injuries to the neck and low back in the accident. He was of the view that some disability from the accident was expected for three to five months, but that the problems she experienced after that time period were most likely related to her pre-existing condition and past injuries. He noted that she had experienced back pain for a number of years prior to the accident and that she had degenerative osteoarthritis of the lumbar spine at L4 and L5.

[16] Dr. Aulakh's clinical records contain numerous references to complaints that Ms. Duley made to him of pain or functional problems prior to the accident. When these clinical entries were read to her at trial, she had no recollection of any of the complaints. She was also asked more generally about neck and back problems before the accident, but her response was the same:

Q. Before the accident of June 6, 2004, you had problems with your neck and back; correct?

A. Before the accident?

Q. Yes.

A. There was no problem in my back - there was no problem in my neck before. In my back, about that, I saw doctor's notes. My lawyer showed that to me. It's written in there. If it's in doctor report, then I must have gone to him about that. But I don't remember about my back was hurting before.

[17] That answer nicely summarizes her evidence with regard to her recollection of pre-existing injuries and complaints of pain. More than 20 notes in the clinical records were read to Ms. Duley in cross-examination. These notes referred to pain in her right shoulder, elbow, arm and hands, as well as in her neck and back. Each time she answered that she did not recall having made the complaint. She gave the same answer with regard to a motor vehicle accident prior to the accident in question. She did not recall the accident or the complaints to her doctor following that accident.

[18] Ms. Duley's lack of memory extended to matters after the accident where the evidence was unfavourable to her. For example, Mr. Dhanji gave evidence that Ms. Duley told him that her pain was 30 to 40% better after the 1 ½ months of physiotherapy treatments. Although this statement was made less than one month before the commencement of the trial, when asked about it Ms. Duley inexplicably answered: "I don't remember that."

[19] In contrast, Ms. Duley testified that she was able to recall one thing about her initial reports to Dr. Aulakh and Dr. Sidhu. Dr. Aulakh's notes from her first visit indicate that she complained of left-sided neck and back pain. Similarly, Dr. Sidhu's notes from her first visit indicate that she complained of left and right cervical pain and left upper trapezius pain. When faced with those notations, Ms. Duley stated, "Because I was in so much pain I made a mistake - just slipped out of my mouth saying left, but actually I had more problem in my right." This "mistake" was allegedly repeated at least three times in the period shortly after the accident.

[20] Ms. Duley gave very little evidence in chief regarding her symptoms in the three or four months immediately after the accident. Her vagueness regarding those symptoms was such that the nature and extent of her injuries and complaints in that period is unclear.

- [21] Most of her evidence was directed towards functional problems that she asserted she was having at the time of trial compared with what she believed to be pre-accident condition. The only time she gave specifics about the progression of pain symptoms was in relation to two other events that occurred after the accident. First, she described in some detail how her pain grew worse while she was working at Wingtat Farms, a chicken factory in Surrey. Second, she described how she felt that her problems became worse for a few months after her husband died.
- [22] She began to work at Wingtat Farms on September 21, 2004, about 3 ½ months after the accident. When she applied for the job, she felt that her injuries had improved to the point that she could work full time. On the application form she stated that she was available to work seven days a week from open to close as well as overtime. The day before she started, a physician completed a Medical Certification for the employer which stated that she was given a complete examination and that she was found to be in good health. She worked at Wingtat Farms from September 21, 2004 to November 24, 2004. The work was heavy physical labour. She was required to stand at an assembly line with the chickens moving past her at the rate of 20 to 30 per minute. As each chicken passed by, she held it with one hand and pulled its guts out with her other hand. After starting work at the factory, she began to experience pain in her right shoulder, right arm and down her back. The pain slowly got worse and in the end she was unable to do the job, so she quit.
- [23] After her husband died on December 30, 2004, she went through a period of grieving and insomnia. She also indicated that the pain from her injuries became worse for approximately three to four months.
- [24] Much of Ms. Duley's evidence in chief was directed to her functional difficulties with her duties around the house. Both before and after the death of Mr. Duley, Ms. Duley and her sister-in-law, Darbar Duley, were usually the only two adults in the house. The women carried a heavy burden in terms of housework and providing for the family. Darbar Duley has worked as a farm worker since 1990 for approximately six months of each year. During the working season, she normally works seven days a week for 10 to 13 hours a day. Ms. Duley spent a few summer seasons working on the farms. However, she was the primary family caregiver before the death of her husband, and it appears that this role became even more entrenched after his death.
- [25] Ms. Duley's household chores were described in some detail. A large part of the family diet was traditional Indian food, so she spent a good deal of time each day making roti, sabji and saag. She did the ironing, cleaning and cooking. She was the primary caregiver for her mother-in-law, Jaswant Duley. Jaswant Duley had a pronounced germ phobia which resulted in an elaborate routine. She spent four or more hours bathing each day and demanded that the doors and walls of her bedroom be continually cleaned. The bathing routine was carried out in two bathrooms and left them covered in water, so it required repeated cleaning of those rooms as well as a considerable amount of laundry. Ms. Duley attended to her mother-in-law and these chores in a tireless fashion both before and after the accident.

- [26] Ms. Duley and the family members who gave evidence described the assistance that Ms. Duley required at the time of trial. Darbar Duley helped with making the roti, her nephew, Jimmy Duley did a lot of the vacuuming, her father-in-law, Kahar Duley assisted with the shopping and gardening, and her niece, Renu Duley helped with the care of her children. However, their evidence about the period after the accident and before the work at Wingtat Farms was vague. The family members did not indicate what assistance, if any, was required during that time. I was left with the strong impression that the assistance was required primarily as a result of Ms. Duley's complaints about her right arm or shoulder, which only began after she started work at Wingtat Farms. It was also clear that the family provided more assistance to her after the death of her husband.
- [27] The family members, particularly, Jimmy and Renu Duley, made it clear that up to the date of trial, Ms. Duley remained the individual who did most of the work at the home. While others provided assistance, as one would expect in a large family, Ms. Duley still carried out most of the duties required to maintain the family. She remained the backbone of the family.
- (b) Right Shoulder
- [28] As noted above, Dr. Aulakh's diagnosis was of neck and back strains. He did not diagnose any shoulder injury from the accident. His notes indicate some shoulder pain (without indicating whether it was the right or left side) on June 15, 2007. His records also note that Ms. Duley complained of right shoulder pain on December 21, 2004, about a month after she left Wingtat Farms. His records indicate that Ms. Duley complained of right shoulder pain on a number of occasions in the four or five years prior to the accident. His records of February 3, 2004 include the notation "complaints of right shoulder pain,? abduction to 300 ? rotator cuff?".
- [29] As mentioned above, Ms. Duley stated at her first visit to Dr. Sidhu that she was experiencing left upper trapezius pain. Dr. Sidhu first noted right shoulder pain in the rotator cuff muscles on November 16, 2004. This coincides with her last days of employment at the chicken factory.
- [30] Dr. Schweigel was of the opinion that Ms. Duley's complaints of shoulder pain after she left Wingtat Farms were unrelated to the accident and were more likely related to the chronic shoulder pain that she had complained of in the years leading up to the accident. He offered the view that shoulder pain in the first weeks after the accident would likely be pain radiating from the neck, as this is quite common.
- [31] Dr. Adrian was of the opinion that Ms. Duley's right shoulder pain is probably related to a number of factors, including soft tissue pain and referred pain from the injured structures involving her cervicle spine.

[32] Dr. Feldman noted that Ms. Duley presented with a mild myofascial pain syndrome in the shoulder girdle musculature. His prognosis was of complete resolution of the myofascial pain syndrome in the posterior shoulders within three to six months after the onset of physical therapy and massage treatment. As noted above, Ms. Duley commenced physiotherapy treatments and experienced substantial improvement, but stopped the treatments after six weeks.

(c) Right Arm

[33] In a signed statement given to an ICBC adjuster on June 9, 2004, Ms. Duley stated that "I have pain in my right forearm before this accident and it has hurt since the accident but I do not know if it is from the accident or not." Apart from this statement, there is nothing in the contemporary records to indicate that she suffered an injury to her right forearm in the accident. Indeed, on the same day that she gave the statement she filled in an ICBC "Insurance Claim Application" in which she described her injuries as being to her "neck and low back".

[34] Dr. Aulakh's records do not indicate an injury to her right forearm or elbow. Neither of his reports includes a diagnosis of injury to her right forearm. There is no reference to pain in the right forearm until two years post-accident. There is a brief reference to bilateral radiating arm pain in December 2004, but nothing to indicate that the pain was in the forearm.

[35] Similarly, Dr. Sidhu's records do not indicate any such injury. Further, his medical legal report does not contain any such diagnosis.

[36] Dr. Feldman said that "it is difficult to determine whether the accident caused significant increase in the pathology in the area ." He felt that it was possible that Ms. Duley had a vulnerability in the right forearm as a result of her pre-existing problems in that area and that she became symptomatic as a result of the accident. He theorized that she gripped tightly on the steering wheel when her vehicle was struck from behind and that the exacerbation of her elbow pathology resulted from the violence of the incident.

[37] Dr. Adrian was of the opinion that Ms. Duley's right forearm symptoms were suggestive of a diagnosis of mild carpal tunnel syndrome. He felt that it was unlikely that these symptoms are causally related to the accident, given the temporal gap between the accident and the onset of the symptoms.

[38] Ms. Duley did complain to her physician on a number of occasions prior to the accident of problems with her right forearm. Dr. Aulakh's records indicate that he had tentatively diagnosed both tennis elbow and carpal tunnel syndrome. There were also notations in his clinical records of the presence of cysts on her forearms and of bilateral hand pain.

[39] On a functional basis, it appears that within the last year or two the most problematic symptom for Ms. Duley has been the pain in her right forearm. This is the symptom that has caused her difficulty with the daily chores of making roti, cutting vegetables and vacuuming.

(d) Discussion

[40] The determination of the nature and extent of Ms. Duley's injuries caused by the accident requires, as a first step, consideration of whether the injuries were caused by the accident. The test for causation in negligence actions remains the "but for" test, which requires the plaintiff to prove on a balance of probabilities that the injury would not have occurred but for the negligence of the defendant. This was confirmed recently in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, in which McLachlin C.J. stated at para. 23:

The "but for" test recognizes that the compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, per Sopinka J.

[41] Accordingly, the question in this case is whether Ms. Duley would have suffered the injuries she complains of but for the negligence of the defendants. She is not entitled to recover damages for those injuries that she would have suffered regardless of the defendants' negligence.

[42] There is no doubt that Ms. Duley did suffer neck and back injuries that she would not have suffered but for the accident. The question is more difficult with regard to the right shoulder and right forearm injuries. To decide Issue A, I must first consider the credibility and reliability of Ms. Duley's evidence and then make factual determinations regarding the nature and extent of her symptoms. I must also consider the use that can be made of the clinical records. Following that determination, I must consider the expert evidence to decide the issue of causation.

[43] At the commencement of trial the defendants objected to the admissibility of the clinical records of Dr. Aulakh and Dr. Sidhu for the truth of the facts contained in those records. The parties did agree that the records were admissible pursuant to the provisions of the Evidence Act, R.S.B.C. 1996, c. 124, for proof of the fact that the statements were made by Ms. Duley to those doctors on the dates indicated in the records. Once the parties agreed to admit the records for this limited purpose, I indicated that I would rule on the admissibility of the records for the truth of their contents at the end of the trial.

[44] In *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431, [2007] 9 W.W.R. 598, Kirkpatrick J.A. upheld the trial judge's refusal to admit a large book of clinical records for the truth of the matters stated therein. In doing so she noted that the hearsay exception for contemporaneous bodily sensation rests on the guarantee of reliability that may be presumed from a spontaneous utterance. She went on to state at para. 38:

The party invoking the hearsay exception must focus precisely on those statements in the records that it seeks to have admitted under the exception and the necessity of relying on the particular hearsay. The exception simply cannot apply without first establishing in each instance the requisite contemporaneity. It is unacceptable for a party to make a blanket assertion that statements of pain made to doctors and therapists should be accepted for their truth. In the instant case, there were hundreds of pages of clinical and other records, some of which were legible and some not; replete with the recorder's shorthand and technical terms; and containing ambiguous references to what the plaintiff reported. It is impossible to discern from the records themselves whether any given statement of pain was contemporaneous or in relation to a historical sensation.

[Emphasis in original]

[45] The situation is the same in this case. There are dozens of pages of brief and somewhat cryptic clinical notes. Neither party called Dr. Aulakh as a witness. There was no attempt with either set of records to establish "in each instance" the requisite contemporaneity. Ms. Duley did state that she always told her doctors the truth and that she attempted to answer their questions regarding her pain symptoms accurately. However, as noted in Samuel, the blanket assertion that statements made to the doctors were truthful does not satisfy the requirement for contemporaneity.

[46] In reviewing the records and the evidence of the plaintiff and her physicians, it is impossible to say whether any given statement of pain was contemporaneous or in relation to a historical sensation. Accordingly, I must find that the test in Samuel has not been satisfied and that the clinical records are not admissible for the truth of their contents.

(e) Findings

[47] I have concluded that I am unable to give much credence to Ms. Duley's evidence regarding her symptoms and complaints of pain both before and after the accident. I have set out above some of the difficulties and inconsistencies in her evidence. I have also taken into account her demeanour, the vagueness of most of her positive assertions and the selectivity of her recollections. Ms. Duley is unsophisticated and had a grade nine or ten education in India. While I do not believe that she was intentionally misleading the court, I did form the impression that she was highly impressionable and easily manipulated such that she was not able to accurately recall and relate her medical history. Her evidence regarding the nature and extent of her injuries, to a large extent, was what she believed she should say, rather than an accurate recollection of what occurred. Indeed, I conclude that she did not have a clear recollection of the progress of her injuries and symptoms. As a result, I am not able to accept much of her testimony regarding the nature and extent of her symptoms. I also conclude that her reliability as a historian for the physicians that she saw once the litigation was commenced is questionable. Given her difficulties in recalling and describing her past physical condition at trial, I must infer that she had a similar difficulty in doing so for the physicians that she saw in that time period, particularly with the experts who saw her for

the purpose of preparing medical legal reports.

(i) Neck and Back

- [48] I have concluded that Ms. Duley suffered injuries to her neck and back as a result of the accident. However, I do not accept the opinion of Dr. Adrian that she suffered an unspecified injury to the musculoskeletal structures from which she is unlikely to recover. That opinion is at odds with both of the treating caregivers (Drs. Sidhu and Aulakh), whose views must be given more weight given the difficulties, highlighted above, with the reliability of Ms. Duley's evidence. Dr. Adrian's opinion was prefaced on his understanding, from the history that he took from the plaintiff, that she had not experienced physically limiting symptoms prior to the accident and had experienced persistent pain since the accident. Neither of those assumptions appear to be correct based on the notations in the clinical records.
- [49] Dr. Feldman's opinion that Ms. Duley suffered from a mild myofascial pain syndrome in her neck and lower back is the diagnosis most consistent with the reports of pain in the clinical records and the surrounding circumstances. In particular, I note that he was of the view that once Ms. Duley started treatment she could expect complete resolution within three to six months. She appeared to be well on her way to that resolution with the physiotherapy treatments from Mr. Dhanji after 1 ½ months. As Dr. Feldman had anticipated, the treatment was very effective. Neither the plaintiff nor her counsel offered any explanation as to why those treatments were stopped. However, the evidence of the efficacy of the treatments is significant because it provides concrete support for Dr. Feldman's diagnosis and prognosis.
- [50] Ms. Duley's counsel was extremely critical of the evidence of Dr. Schweigel on the basis that he had crossed the line from expert to advocate. In support of that position he notes that Dr. Schweigel was paid \$796,000 by ICBC in 2006, more than twice as much as any other expert physician. In addition, he notes that Dr. Schweigel's reports used inappropriate and imprecise language to describe her medications, and that he tailored his language to minimize her supportive symptoms and to emphasize those symptoms that supported his opinion. In short, he asserts that the reports are more argument than opinion. He also argues that Dr. Schweigel's manner in giving evidence was argumentative and not that to be expected from an expert witness who should be providing an independent viewpoint to the court.
- [51] I reject Dr. Schweigel's opinion with regard to the neck and back injury. I agree that he did, at times, cross the line to advocacy both in his reports and in giving evidence. While I do not accept his opinion on this aspect of the claim, I do not reject his evidence in total as I was invited to do by the plaintiff. As Dr. Feldman stated, the principles set out in Dr. Schweigel's report can provide a basis for a better understanding of the issues that arise in these cases. Rather than rejecting his evidence in total, I have given it less weight.

[52] Having found that Ms. Duley suffered from a mild myofascial pain syndrome, the next matter for determination is the length of time that she suffered from it. As I have noted above, I have found Ms. Duley's evidence in this regard to be unreliable. Further, a plaintiff has a duty to mitigate and it is clear that she did not take the steps recommended by Dr. Feldman and her physiotherapist. She missed a significant number of her scheduled appointments and then stopped treatment before it was completed. She also stopped her chiropractic treatments after one year even though she appeared to be getting some benefit from them. While I am of the view that the length of the partial disability was more than three to five months, had she commenced and continued with treatment it is highly likely that her neck and back injuries would have been resolved some time before trial. I will accordingly assess damages on the basis that the symptoms should have resolved by early 2007 had she sought treatment and followed the recommendations of her physicians.

(ii) Right Shoulder

[53] I also accept the opinion of Dr. Feldman with regard to the plaintiff's shoulder injury. Once again his opinion was based on assumptions regarding her history that are consistent with the notations in the clinical records. He concluded that she had mild myofascial pain syndrome in the shoulder girdle musculature. I note that other than complaints of bilateral pain in the upper trapezius muscles, Ms. Duley did not have significant symptoms in the right shoulder until after she began work at Wingtat Farms, where the repetitive work was likely to cause shoulder pain. I also find some significance in the fact that she had previously reported pain in the shoulder which Dr. Aulakh believed might be related to a rotator cuff issue. In other words, the work at the chicken factory may have aggravated the pre-existing problem in the right shoulder.

[54] Nevertheless, I conclude that she did suffer an injury to her shoulder girdle musculature and that this persisted for a time period similar to that of her neck and back injury. I am of the view that the shoulder pain from the accident was a contributing factor to the pain that she experienced while working at Wingtat Farms. This is the case even though she felt that her injuries had healed prior to commencing work. I find that her return to work likely exacerbated the shoulder injury for a number of months. I also find that the mild myofascial pain syndrome in her shoulder should have resolved by early 2007, at the latest, had she sought treatment and followed the recommendations of her physicians.

(iii) Right Arm

[55] This is the most contentious of the injuries alleged by Ms. Duley. It is also the most important because on a day to day functional basis it has the most significant impact on her. The physicians, other than Dr. Feldman, were of the view that Ms. Duley's right forearm problems are not related to the accident. They based this opinion on the assumption that she made no complaints of an injury to her forearm in the accident.

- [56] Ms. Duley stated that she did suffer pain in the forearm as a result of the accident and says that the statement to ICBC supports her recollection. As noted above, I do not consider Ms. Duley's evidence that she recalls pain in the forearm after the accident as credible. Her comment in the statement to ICBC was that "I have pain in my right forearm before this accident and it has hurt since the accident but I do not know if it is from the accident or not". On its face, this statement does not support the allegation that there was an injury - only that the condition of the forearm was unchanged by the accident. The Insurance Claim Application that she filled out on the same date did not claim an injury to her right arm. More significantly, neither Dr. Sidhu nor Dr. Aulakh has a record of any complaint of such injury in the months following the accident. There is no record of a problem with the forearm until after she started working at Wingtat Farms, where she was performing activities that put repetitive stress on the arm. On November 16, 2004, for the first time, there is a notation of numbness in two fingers of her right hand.
- [57] Dr. Schweigel noted in his report that it is a basic principle in medicine that if a site has been traumatized or aggravated that site becomes symptomatic immediately after the traumatic event. He was of the view that the right forearm symptoms were unrelated to the accident. Dr. Adrian was also of the opinion that the right forearm symptoms were not causally related to the accident "given the temporal relationship with the onset of the symptoms and the accident ."
- [58] Even Dr. Feldman acknowledged that "it is difficult to determine whether the accident caused significant increase in the pathology" in the forearm. His conclusion was also based on a false assumption about the mechanics of the accident. He assumed that the blow to the rear of her vehicle was such that Ms. Duley had to grasp the steering wheel tightly for a "prolonged" period of time, causing the injury to the forearm. However, the accident did not involve a significant blow to the rear of the car that would have required a prolonged grasping of the steering wheel. Based on Ms. Duley's evidence, his assumption about the accident dynamics was incorrect.
- [59] In these circumstances, I find that the right forearm condition or injury is not causally related to the accident.

Issue B. What damages is Ms. Duley entitled to given the nature, extent and duration of the injuries caused by the accident?

[60] I will address Ms. Duley's claim for damages under the following headings:

- (a) Non-pecuniary damages;
- (b) Past wage loss and past loss of housekeeping capacity;
- (c) Future losses; and
- (d) Special damages.

(a) Non-pecuniary Damages

- [61] The plaintiff argues that the appropriate award for non-pecuniary damages is in the range of \$50,000 to \$80,000. She argues that the injuries resulting from the accident have had an "incredible intangible impact" on her life which must be understood in the context of her culture. Her counsel referred to the following cases: *Tardiff v. Toews*, 2004 BCSC 1009; *Love v. Lowden*, 2007 BCSC 1007; *Bafaro v. Jiang*, 2007 BCSC 686; *Krznaric v. Harada*, 2006 BCSC 1421; *Kerr v. Macklin*, 2004 BCSC 318; and *Zubek v. Clarkson*, 2000 BCSC 148. I have reviewed these decisions and do not find them to be of assistance, as they involved injuries that were more serious and of longer duration than is the case here.
- [62] The defendants put forward two arguments. Both arguments are based on the premise that Ms. Duley suffered a soft tissue injury to the neck and a temporary aggravation of a pre-existing mild soft tissue injury to the lower back. The first argument is based on her suffering from those injuries for a duration of three months. As I have found that the duration of the injuries was much longer than that, I need not consider the cases cited by the defendants in support of this argument.
- [63] The defendants' alternative argument is based on Ms. Duley suffering from the injuries for the duration of three years. In this case, they submit that the appropriate damages range is \$22,000 to \$25,000 on the basis of the following cases: *Whittington v. Goupil*, [2000] B.C.J. No. 2775 (S.C.) (Q.L.); *Linekar v. Andreiko*, 2004 BCSC 494; *Carinci v. Adams*, 2000 BCSC 992; *Smith v. Towns*, 2005 BCSC 79; *Golam v. Fortier*, 2005 BCSC 598; *Deno v. Cooper*, 2006 BCSC 1326; and *Taylor v. Bury*, 2007 BCSC 1130.
- [64] I have also considered the following cases that were not cited by counsel: *Richards v. Parker*, 2003 BCSC 758; and *Laroche v. MacPhail*, 2007 BCSC 1451.
- [65] As stated above, I have concluded that Ms. Duley suffered from a mild myofascial pain syndrome in her neck and back that should have resolved by early 2007. I have also found that she suffered some injury to her right shoulder that should have resolved by early 2007. The right shoulder injury was exacerbated by her work at Wingtat Farms and contributed to the pain that she experienced while working there. I find some assistance in the cases cited by the defendants in support of their alternative position. However, I find that the range of damages should be slightly higher, since I have concluded that some of Ms. Duley's shoulder problems were a result of the accident. In the circumstances of the case, I conclude that Ms. Duley is entitled to \$28,000 in non-pecuniary damages.

(b) Past Wage Loss and Past Loss of Housekeeping Capacity

- [66] The plaintiff claims both past income loss and past loss of housekeeping capacity. She argues that the two losses are completely interwoven in her case, due to contingencies such as the death of her husband and changes in the family unit. Her position is that her loss from the time of the accident up to the date of trial is in the range of \$40,000 to \$45,000.

- [67] At the time of the accident, Ms. Duley was an unemployed homemaker. There was no evidence at trial that she was intending to look for work around the time of the accident, or that she delayed in applying for a job because of the accident. As noted above, Dr. Aulakh was of the opinion that she had no periods of total disability after the accident and was not disabled from work, although she did have a partial disability for about 14 weeks. I do not find that she is entitled to any past wage loss or past loss of housekeeping capacity for the period immediately following the accident.
- [68] Ms. Duley applied for the job at Wingtat farms on September 20, 2004 and began work one day later. She worked there until November 24, 2004, when she quit because of her increasing pain symptoms.
- [69] The claim for past wage loss is complicated in this case by my conclusion that the injuries to Ms. Duley's right arm were not caused by the accident. The work at the chicken farm was heavy physical labour, and the right forearm injury would likely have prevented her from continuing in the job in any case. Further, it is likely that she would have stopped work for a period of grieving after her husband passed away on December 30, 2004. There was also evidence that after the death of her husband, there was a family decision that she would take on most of the housekeeping responsibilities while Darbar Duley would take on more of the income-earning responsibility.
- [70] I find that the plaintiff is entitled to one month's wages at Wingtat Farms. She earned \$8 per hour and worked between 23 and 34 hours per week, and is only entitled to her net income after deducting income tax payable. On this basis, I assess past wage loss at \$800.
- [71] Similarly, Ms. Duley's functional difficulties with housekeeping were related primarily to the complaints about her right arm or shoulder, which only arose after she started work at Wingtat farms. The right arm injury, which is unrelated to the accident, has caused her the most difficulty with her daily chores. The evidence of Ms. Duley and the family members was that she was able to do most tasks including caring for her mother-in-law, with the family members assisting her with vacuuming, shopping, gardening, and care for the children. I conclude that Ms. Duley suffered a 5% loss of past housekeeping capacity as a result of her shoulder injury, and that the loss occurred over a period of just over two years from after the work at Wingtat Farms until early 2007 when the injury should have resolved. I must also make reductions for negative contingencies, as well as for the time periods that Ms. Duley was employed outside of the home, grieving for the death of her husband and in India. Accordingly, I assess damages for past loss of housekeeping capacity at \$1,500.
- (c) Future Losses
- [72] I have concluded that the neck, back and shoulder injuries that were caused by the accident should have resolved by early 2007 had Ms. Duley sought treatment and followed the recommendations of her physicians. Accordingly, the plaintiff is not entitled to damages for loss of earning capacity, future loss of housekeeping capacity, or cost of future care.

(d) Special Damages

[73] Ms. Duley claims \$1,538.29 for special damages. The defendants do not take issue with any of them. The plaintiff is entitled to the full amount of her special damages claim.

Conclusion

[74] The plaintiff is entitled to damages in the amount of \$31,838.29, consisting of the following:

- (a) non-pecuniary damages of \$28,000;
- (b) damages for past wage loss of \$800;
- (c) damages for past loss of housekeeping capacity of \$1,500; and
- (d) special damages of \$1,538.29.

[75] Before trial, the plaintiff discontinued the action against all defendants except Natalija Friesen and Wescott Lauren Friesen. The award of damages will therefore stand against only these two defendants.

[76] If either party wishes to make submissions on the issue of costs they can do so in writing through the registry. Otherwise, the order will be that Ms. Duley is entitled to costs at Scale B.

"Butler J."

The Honourable Mr. Justice Butler

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