

CANADA / JUDGMENT

Earl v. Cindrich

2020 BCSC 197

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 197 Earl v. Cindrich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Earl v. Cindrich,

2020 BCSC 197

Date: 20200124

Docket: M31811

Registry: Chilliwack

Between:

Bonnie Gail Earl

Plaintiff

And

Kaden Cindrich and Lisa Yvonne Cindrich

Defendants

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

Counsel for the Plaintiff:

A.G. Cline

Counsel for the Defendants:

J.R. Filek

Place and Date of Trial:

Chilliwack, B.C.

January 21 and 22, 2020

Place and Date of Judgment:

Chilliwack, B.C.

January 24, 2020

Introduction

- [1] The plaintiff, Ms. Earl, seeks damages arising from personal injuries sustained in a motor vehicle collision which occurred in Langley on 16 September 2015. Ms. Earl's vehicle was stopped at a light when it was rear-ended by a vehicle driven by the defendant Mr. Cindrich and owned by the defendant Ms. Cindrich. The defendants admit liability for the collision. The trial was therefore focused on the nature and extent of Ms. Earl's injuries and the quantum of damages to which she is entitled.

The Collision

- [2] As noted, the collision occurred on 16 September 2015, at the intersection of 208 Street and 42nd Avenue in Langley. Ms. Earl's vehicle was stopped at a red light behind two other cars when it was rear-ended by the vehicle driven by Mr. Cindrich. Ms. Earl was wearing her seatbelt. The collision caused significant damage to the back of Ms. Earl's vehicle, which was written off. Immediately after the collision, Ms. Earl took stock of her situation. She was shocked but did not lose consciousness. She felt pain in her left leg more or less immediately.
- [3] Firefighters attended the scene but Ms. Earl was not in need of immediate medical assistance. Ms. Earl was able to drive home to her house after the collision, although, as noted, her vehicle was later assessed and written off.

Onset of Symptoms and Initial Medical Assessment

- [4] As noted, Ms. Earl felt pain in her lower left leg more or less right after the collision. As the day wore on, she began to experience more pain symptoms. She attended Peace Arch Hospital later in the day, and by that time she was experiencing pain in her lower left leg, lower back, right arm, and both shoulders, with some pain radiating into her head. She was assessed by an attending physician, who recommended physiotherapy and indicated that it would be appropriate for Ms. Earl to take a week off work. It is not clear that Ms. Earl did take a full week off of work.

Subsequent Treatment History

- [5] As described in somewhat more detail below, Ms. Earl initially experienced pain in her neck, shoulders, arm, and back, but her principal and most persistent concern has been pain in her low back, sacroiliac joint and left leg. Following the collision, Ms. Earl sought and obtained various forms of treatment, most notably chiropractic treatment and physiotherapy.
- [6] With respect to chiropractic treatment, Ms. Earl attended 13 sessions between September 2015 and March 2017.
- [7] With respect to physiotherapy, Ms. Earl had basically three separate stints of physiotherapy treatment, specifically (a) an initial spate of some 20 treatments between September 2015 and April 2016, (b) a return to physiotherapy with a further four treatments between October 2017 and December 2017, and (c) another return to physiotherapy with four more treatment sessions between September 2018 and November 2018. Ms. Earl also received advice or instruction for at-home stretching and exercises, which she has followed with some degree of regularity.
- [8] Ms. Earl has also taken various medications to manage pain. Specifically, she obtained and filled a prescription initially for Naproxen, and since then has been taking non-prescription pain medications, Tylenol and Advil, on a regular basis, and also using a heating pad.

The Nature of Ms. Earl's Injuries and Progression of Symptoms

- [9] Ms. Earl testified that she initially experienced pain in her neck, shoulders, head, arm, low back, left hip, and left leg. Her neck, shoulder, and arm pain has resolved over time. However, Ms. Earl continued to experience pain in her sacroiliac area, her left hip, and her left leg.
- [10] Ms. Earl testified that the symptoms are worse with increased activity, such as doing housework, working in the kitchen for extended times (for example while cooking and baking for holidays), travelling, walking, and dancing.
- [11] At the time of trial, some four and one-half years after the collision, Ms. Earl continues to experience pain in her low back (sacroiliac joint) and left leg on an ongoing basis. Ms. Earl testified that her pain varies. She said the pain is worse during, or more significantly, after periods when she is active. Ms. Earl testified that at the time of trial she experiences pain which fluctuates in intensity. She rated her pain at seven or eight out of 10 at its worst and two or three out of 10 at a more or less constant level.

- [12] At this point, I will note that Ms. Earl was an entirely credible witness who did not come across in the witness stand or through any of the evidence I have heard as someone who is inclined to overstate her condition, or even let it interfere with her lifestyle any more than is absolutely necessary. In short, she presented as credible in recounting the nature of her symptoms, and stoic in terms of how she copes with her conditions.
- [13] However, even though I have no difficulty accepting that Ms. Earl was an entirely credible witness, sometimes cross-examination adds additional perspective or rounds out the evidentiary record. I found that to be the case here, where Ms. Earl fairly conceded a number of points in cross-examination which helped to present a more well-rounded picture of her situation.
- [14] First, Ms. Earl conceded on cross-examination that her sacroiliac and left leg pain have improved overall by about, I believe, 50 to 100 percent was the evidence, since the time of the collision. In any event, I interpret her evidence to mean that overall her condition is basically half as bad as it used to be at its worst.
- [15] Second, Ms. Earl was presented with certain clinical records and conceded that there have been times over the course of the last four and one-half years, particularly at the end of each stint of physiotherapy treatment, where her symptoms have resolved and she was pain free.
- [16] Third, with regard to her evidence in chief that at present she feels like the pain has gotten worse and that it presently is a constant pain level of two to three out of 10, increasing to seven to eight out of 10 during or after activities, Ms. Earl agreed that her pain is worse in periods or following periods when she is more active. She further agreed that she has been very active over the past month or so. In particular, Ms. Earl was very active in preparing family meals during the Christmas holidays, and she has since taken a nine-day trip, I believe to Arizona.
- [17] The net result of all this is that, while Ms. Earl testified in chief that recently she is feeling worse and that her sacroiliac and left leg pain are presently a constant pain of two to three out of 10, increasing seven out of 10 during or after activities, this present perception might fairly be regarded as an episodic flare-up of symptoms following a period of increased activity.

Effect of Ms. Earl's Condition on Her Activities and Lifestyle

- [18] I would summarize the evidence with regard to the effect of Ms. Earl's continuing condition on her activities and lifestyle as follows. Ms. Earl finds housework more painful and difficult. She is still able to do housework but it causes pain and contributes to flare-ups. The pain has affected the quality and enjoyment of some of the activities which Ms. Earl most enjoys, including dancing, walking, and travelling. The pain also causes some difficulty for Ms. Earl when sleeping, although it is not suggested that Ms. Earl is unable to sleep or that the amount of sleep she gets is significantly reduced from the injury. It is a question, I suppose, of the quality of uninterrupted sleep that Ms. Earl is able to achieve.

- [19] The pain has made it difficult for Ms. Earl to be intimate. Ms. Earl is presently single but actively dating and interested in a long-term relationship. Her back and leg pain cause discomfort during sexual intimacy and this presently affects her and also causes her to worry how it might affect future relationships.
- [20] The pain has caused Ms. Earl to suffer from periods of low mood and bouts of apathy. Ms. Earl has previously experienced bouts of apathy and depression, and the pain contributes to this.
- [21] With regard to employment, Ms. Earl's symptoms do not limit her at work, as she has a sit-stand workstation and a proper seat. She is actually comfortable and experiences no significant symptoms while at work. When at work, she does not think about her symptoms or limitations. However, as Ms. Earl plans to retire in the future, perhaps in five years or so, she is concerned that with the increased leisure time she will experience more pain and more limitations in what she is able to do.

Travel

- [22] There was considerable evidence about Ms. Earl's travel history before and after the collision. After the collision, Ms. Earl has taken multiple trips or vacations, including an annual summer driving trip to Kelowna, Revelstoke, Halcyon Hot Springs, and sometimes into Alberta, as well as trips to Ireland, New Orleans, Mazatlán, and Arizona. The evidence is that, despite her injuries from the motor vehicle collision, Ms. Earl was able to go on these trips, so her injuries were not such as to affect her ability or capacity to take vacations. However, the evidence was that the quality or degree of enjoyment of these trips was affected by Ms. Earl's injuries. In particular, Ms. Earl testified, and her evidence on this point is not in dispute and also supported by the testimony of her friend Ms. Van Veen, that during these trips she is quite active, specifically that she goes on walks, sightseeing, shopping, and such, and that she also goes dancing.
- [23] Ms. Earl has been able to engage in these activities but the result is that during and, more significantly after such activities Ms. Earl experiences pain in her sacroiliac and left leg and has difficulty sleeping, or experiences restlessness while sleeping. There is also some evidence that on a few limited occasions Ms. Earl has actually had to limit the scope of her activities, for example by cutting short a long walk or by having to rest or take breaks on account of pain or discomfort from her injuries.

Expert Medical Evidence

- [24] As part of her case, Ms. Earl tendered an expert report from Dr. Sangha, an expert in physiatry. The report was admitted without objection and without cross-examination, and is thus undisputed. I take four things from this report.

- [25] The first thing is that during his examination and assessment of Ms. Earl's condition Dr. Sangha observed objective indicia of pain and injury that are consistent with Ms. Earl's subjective complaints as described above. Thus, there is some objective medical evidence to support Ms. Earl's assertion that she was injured and experiences pain as a result.
- [26] The second is the diagnosis. After examining Ms. Earl and studying the file, Dr. Sangha determined that Ms. Earl suffers from chronic myofascial sprain or strain to the lower back. Dr. Sangha diagnosed Ms. Earl with (a) left sacroiliac joint dysfunction and (b) left piriformis syndrome secondary to the same. The areas of pain are limited strictly to Ms. Earl's low back/buttock area and left calf.
- [27] The third thing I take from Dr. Sangha's report is with respect to prognosis. Dr. Sangha says that the bulk of recovery for such conditions normally occurs in the first year and that in Ms. Earl's case, some four years after the collision, she has likely reached maximum medical recovery. She can thus be expected to have persistent symptomology for the long term and will have exacerbations and flare-ups depending on the type and degree of activities in which she participates.
- [28] The fourth and final thing I take from Dr. Sangha's report has to do with future treatment. On this point, Dr. Sangha offers his opinion that Ms. Earl would benefit from "an active conditioning program focusing on improving strength and flexibility of musculature in the low back and buttock". This would include piriformis stretching, core strengthening, and also active release therapy. Dr. Sangha also recommended that Ms. Earl continue with intermittent supportive care, namely physiotherapy, for flare-ups and exacerbations of her conditions.

Pre-existing Conditions

- [29] Ms. Earl has had prior problems with carpal tunnel syndrome and with some pain in the front portion of her hips, but there is no suggestion that these are confused with or linked in any way to the injuries sustained in the collision which is the subject of this action.

Subsequent Collision

- [30] Ms. Earl was involved in a subsequent collision, a fender bender, but there is no suggestion that it had any impact whatsoever on the injuries suffered during the collision which is the subject of this court action.

Analysis

- [31] The defendants concede liability for the collision and they also concede causation; that is, that the collision was the cause of the injuries for which Ms. Earl now seeks compensation.

Non-pecuniary Damages

- [32] With respect to non-pecuniary damages, the leading case is *Stapley v. Hejslet*, 2006 BCCA 34. I will not recount the applicable principles, which are well known. Basically, I must award damages to compensate Ms. Earl for pain and suffering, loss of amenities, or loss of enjoyment of life to the extent that a financial award can achieve those things. The quantum of the award is determined not just by reference to the particular injury in the abstract but how the injury has affected the plaintiff, having regard to her age, circumstances, activities, relationships, and the like.
- [33] In this case, Ms. Earl was 56 at the time of the collision and is now 60 years old. She was a relatively healthy person prior to the collision, and reasonably active. She suffered some transitory soft tissue injuries but her principal injury, and the one which continues to cause her pain and suffering, are in relation to her sacroiliac joint and her left leg. My finding is that Ms. Earl's symptoms have improved over time and that she now suffers from intermittent pain in the low back (sacroiliac joint) and left leg.
- [34] Ms. Earl is sometimes pain free and other times has flare-ups. At their worst, the flare-ups can cause pain that Ms. Earl experiences as a seven to eight out of 10. Her symptoms are exacerbated by certain kinds of physical activity. In terms of the effect on Ms. Earl's lifestyle, her injuries have not affected her at work but they have affected her at home and in her recreational or leisure pursuits. She finds it difficult to do housework, although she is able to do it with discomfort.
- [35] Ms. Earl likes to travel and go on vacations, that seems to be a big part of her life, and her symptoms affect her enjoyment of vacations, although they do not prevent her from travelling. Her symptoms also make it painful for her to be intimate, which is a problem in her dating life and a source of concern for her future. She also experiences low mood and apathy brought on by her symptoms or contributed to by her symptoms or flare-ups.
- [36] Ms. Earl has improved considerably but has now experienced maximum medical recovery. She is expected to have continued flare-ups, which are brought on by or exacerbated when she is more active. There is a concern for Ms. Earl in the future, after she retires, in that she may have more leisure time and thus experience more limitations due to her injuries. That is basically a summary of her injuries and their impact upon her life.
- [37] I have been given case law as comparators by both the plaintiff and the defendants. In general, I would say many of the cases presented by the plaintiff involved individuals who are younger than Ms. Earl, a factor that might make the general damage awards higher in those other cases. I would say, on the other hand, that many of the cases cited by the defendants involved individuals with conditions that were expected to resolve over time, and that is not the case with Ms. Earl. This is, of course, just a very general approach or response to the cases that have been cited. The cases, at the end of the day, are only expected to provide some general sense of where the appropriate range of damages lies.

- [38] Having taken all the factors discussed above into account, my conclusion is that Ms. Earl should receive non-pecuniary damages of \$62,500. That award is slightly higher than it might otherwise have been, taking into account the impact of Ms. Earl's injuries on her ability to do housework. The evidence is that Ms. Earl is still able to do housework but that it causes her discomfort and can bring on or contribute to flare-ups of her symptoms. In my opinion, this is an appropriate case to take that issue into account in determining the award of non-pecuniary damages. I do not consider this to be an appropriate case for a discrete award of pecuniary damages based on a loss of housekeeping capacity for reasons that I will explain more fully below.

Pecuniary Damages

- [39] For past wage loss, it is agreed between the parties that Ms. Earl should receive \$704.45. For special damages, that is out-of-pocket costs arising from the collision and associated injuries, it is agreed between the parties that Ms. Earl should receive \$2,824.61.
- [40] With respect to loss of housekeeping capacity, I have already indicated that I do not consider this to be an appropriate case for a discrete pecuniary award for loss of housekeeping capacity as a capital asset. The case law indicates that trial judges have a discretion as to whether to consider the effect of injuries on housekeeping functions as an aspect of general damages, which I have done here, or as a loss of capital asset, which I do not consider appropriate here. The case law suggests to me, although the trial judge has discretion, as a general rule that discretion is exercised in favour of a pecuniary damage award where the plaintiff is effectively rendered unable to do housekeeping work or some aspects of it as a result of the injuries and, as such, can be expected to have to hire someone to do the work for him or her, or where a family member voluntarily takes over the housekeeping work or some portion of it without pay. That is not the situation here. The evidence in this case shows that Ms. Earl actually has the capacity to do housework but that it simply causes her discomfort or exacerbates her symptoms. Thus, this is the kind of case where, in my opinion, it is better to take into consideration that factor in assessing damages for the overall impact of the injuries on the plaintiff's quality and enjoyment of life. I have done that, as noted above.
- [41] For future care, the plaintiff seeks a total of \$14,900 in damages. Of this, the plaintiff seeks some \$6,000 to cover the cost of housekeeping services. That figure is determined as \$25 per hour for two hours twice per month, for an annual cost of \$1,200, for a total of 10 years until Ms. Earl reaches the age of 70, which would amount to \$12,000, which the plaintiff's counsel then proposed to reduce somewhat for the contingency that Ms. Earl may not always incur these costs on such a regular basis. I do not see a case for awarding damages of this sort to Ms. Earl. I have already accounted for the effect of Ms. Earl's injuries on her ability to do housework in fashioning the general damage award. Also, I am not satisfied that there is a real and substantial likelihood that Ms. Earl would actually hire a housekeeper to do housework for two hours, twice per month. Ms. Earl is a stoic individual who generally tries

to keep on going with her life despite her symptoms. Of course she is not to be penalized for that, which is why I have taken the impact of Ms. Earl's ability to do housework and the effect of her injuries on that into account as an aspect of the general damages.

- [42] In the end, the only amounts I would award for costs of future care are for (1) non-prescription medications, (2) heating pads, and (3) physiotherapy.
- [43] With respect to non-prescription medications, Ms. Earl testified that she buys Tylenol, Advil, and Voltaren and uses them to manage the pain in her low back and leg. I would award \$50 per year for 10 years until Ms. Earl reaches the age of 70, for a total of \$500, under this head of damage.
- [44] With respect to heating pads, I accept the plaintiff's submission and I award \$200 to cover the future cost of requiring replacement heating pads.
- [45] With respect to physiotherapy, counsel for the defendants took the position, relying on case law, to suggest that physiotherapy, which only assists the plaintiff in managing or coping with pain with no potential for progress over time, is not medically necessary treatment for which the defendants should be required to compensate the plaintiff. Counsel for the plaintiff, on the other hand, cited the case of *Gignac v. Insurance Corporation of British Columbia*, 2012 BCSC 351, where the court held that costs of future medical care must be: (1) medically justified; and (2) reasonable. On the basis of that authority and the evidence of Dr. Sangha, I find that Ms. Earl has proven an entitlement to damages to cover the cost of future physiotherapy treatments to manage or treat flare-ups in her condition. Dr. Sangha says Ms. Earl will continue to "require intermittent supportive care" in the form of physiotherapy to deal with flare-ups of her symptoms. In my view, that evidence meets the requirements of medical justification and reasonableness.
- [46] With respect to the quantum of damages under this head, it seems to me that in the past four years Ms. Earl has had to attend for physiotherapy treatments three times. The two most recent spates of physiotherapy have been for a total of four sessions each. I will use that frequency and volume of treatment as a yardstick going forward. Assuming that each course of treatment involves four sessions at \$60 per session, the cost for each battery or course of treatments would be \$240. Allowing for seven such courses of treatment over the next 10 years, I would award a total of \$1,640 for future physiotherapy sessions.

Summary

[47] My conclusion, and summary of damages is:

Non-pecuniary damages:

\$ 62,500.00

Past wage loss:

\$ 704.45

Special damages:

\$ 2,724.61

Future care, specifically:

Non-prescription medications:

\$ 500.00

Heating pads:

\$ 200.00

Physiotherapy:

\$ 1,640.00

Total damages:

\$ 66,269.11

[48] Judgment is awarded to the plaintiff in the amount of \$ 66,269.11.

"Riley J."

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