

CANADA / JUDGMENT

Fleming v. McAllister

2017 BCSC 753

COURT

Supreme Court of British Columbia

DECIDED

10 May 2017

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2017 BCSC 753 Fleming v. McAllister IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Fleming v. McAllister, 2017 BCSC 753 Date: 20170510 Docket: M103761 Registry: Kelowna Between: Terrance Allen Fleming Plaintiff And Rory Patrick McAllister, Patrick Terrence McAllister, Danielle Lee Wentland, Minister of Justice Defendants Before: The Honourable Mr. Justice Betton Supplementary Reasons for Judgment Counsel for the Plaintiff: D. Graves C. Wojnarowicz Counsel for the Defendants, Rory Patrick McAllister, Patrick Terrence McAllister and Danielle Lee Wentland: D. Shea Counsel for the Defendant, Minister of Justice: S. Kelly Place and Date of Trial: Kelowna, B.C. December 5 - 8, 12, 13, 2016 Place and Date of Judgment: Kelowna, B.C. March 30, 2017 Place and Date of Supplementary Reasons for Judgment: Kelowna, B.C. May 10, 2017

Introduction

- [1] Based on my Reasons for Judgment dated March 30, 2017 and indexed at 2017 BCSC 521, counsel were required to make further submissions as to the apportionment of damages between three separate motor vehicle incidents.
- [2] At paragraph 128 of that decision I said this:
- [128] Each of the neck and mid back injuries are indivisible and were caused by MVI1 and MVI2. The low back and knee injuries are divisible and caused by MVI1 and MVI3, respectively. I find that MVI2 caused a temporary aggravation of the low back symptoms which is irrelevant to divisibility.
- [3] Absent from those comments was any reference to the plaintiff's shoulder injury referred to in paragraphs 65 to 67 of my reasons. To correct that oversight and based on the medical opinions and on the evidence as a whole, I am satisfied that that is a divisible injury and attributable entirely to MVI2.
- [4] As noted in that decision, prior to trial the plaintiff settled with the defendant in MVI2. The amount of that settlement is not disclosed. Apportionment of Damages for Indivisible and Divisible Injuries

- [5] In their submissions in respect of apportionment of damages, both counsel referred to the Court of Appeal decision in *Ashcroft v. Dhaliwal*, 2008 BCCA 352 [Ashcroft], leave to appeal to SCC refused, 32889 (February 19, 2009). That case involved factual similarity in that the plaintiff had settled with a subsequent tortfeasor and proceeded to trial against the original tortfeasor. The trial judge categorized the plaintiff's injuries as indivisible, and held that the plaintiff was entitled to a global award of \$400,000. The Court of Appeal accepted those findings.
- [6] The Court of Appeal held that, in view of the rule against double recovery (see para. 24), and the "fundamental principle of tort law that 'an injured person should be compensated for the full amount of his loss, but not more'" (para. 22), the settlement amount received by the plaintiff from the subsequent tortfeasor should be deducted from the damage award made against the original tortfeasor at trial where both tortfeasors caused an indivisible injury. The Court held that this was the correct approach both for concurrent torts causing an indivisible injury and consecutive torts causing an indivisible injury (paras. 31-35).
- [7] The Court of Appeal's comments included these:
- [19] In the absence of contributory negligence, apportionment would be a matter of indifference to the plaintiff, barring special circumstances; the tortfeasors would be jointly and severally liable to the plaintiff: see section 4(2)(a) of the Negligence Act, *E.D.G. v. Hammer*, 2003 SCC 52 at 32, [2003] 2 S.C.R. 459, 230 D.L.R. (4th) 554, *Athey*. If both tortfeasors were before the court, apportionment would fall to be determined on evidence they presented and submissions they made. The trial judge would be required to apportion responsibility for the appellant's losses between the tortfeasors in the first and second accidents as required by section 4(1) of the Negligence Act.
- [20] However, in this case, the plaintiff settled her claim with the second tortfeasor and was claiming only the damages attributable to the respondent tortfeasor's fault. In effect, like the plaintiff in *Misko*, she was seeking an apportionment of damages between the admitted tortfeasors and judgment for only the portion of those damages attributable to the fault of the respondent tortfeasor because she had released the second tortfeasor from all responsibility to her. Because the respondent tortfeasor would be responsible only for his share of the appellant's damages, he would have no claim against the second tortfeasor.
- [21] I take the view this apportionment was not necessary. The settlement had effectively apportioned the damages, although the proportionate shares were determined only when the trial judge made the global assessment required in the case of an indivisible injury. Because the settlement amount was not disclosed to the trial judge, and was likely protected by settlement privilege, the trial judge was correct to order that the settlement proceeds be deducted from the global award of \$400,000. Quite properly, he left the door open to submissions and possibly evidence about the appropriate deduction.

- [35] I am not persuaded there is a valid policy reason for treating concurrent and consecutive torts differently when both are necessary causes of an indivisible injury and the losses consequential to it. Indeed, I am not persuaded the distinction is material to the issue before this Court: whether settlement proceeds should be deducted from a damage award made against one of two tortfeasors liable to pay compensation for the loss incurred by reason of their combined negligence
- [41] In my view, even if trial judges were required to apportion responsibility for the appellant's losses between the two tortfeasors, despite the absence from the action of the settling defendant and whether the torts are categorized as concurrent or consecutive, the underlying issue would be the same: whether the two causes of action were separate.
- [42] The two causes of action are not separate: they are linked by the indivisible injury the trial judge found to have been caused by the separate torts. That link brings into play not only joint and several liability, but also the rule against double recovery.
- [8] In circumstances of successive injuries that are not found to be indivisible, such as existed in *Bracey v. Jahnke* (1997), 34 B.C.L.R. (3d) 191 (C.A.), however, a different result follows. The concepts of joint and several liability and double recovery do not arise, as each tortfeasor is separately responsible for the distinct injuries and losses they caused, even if those injuries affect the same part of the plaintiff's body. The Court of Appeal in *Ashcroft* noted:
- [37] In *Bracey*, the defendant sought to bring into account an award for damages suffered in an earlier incident that contemplated future losses embracing the period of the second accident. The trial judge refused, stating that his task was "to properly weigh and assess damages for pain and suffering attributable solely to the [second] 1992 accident." This Court agreed with his approach, holding that the awards and the reasons for judgment in the earlier action were irrelevant and not properly before him.
- [38] In *Bracey*, there was no factual finding of an indivisible loss caused by two tortfeasors in successive accidents, thereby rendering both tortfeasors liable to the victim for the entire loss resulting from that injury and bringing apportionment into play under s. 4 of the Negligence Act. See also *Sauer v. Scales*, 2009 BCSC 1311 at paras. 28-29, *Deol v. Sheikh*, 2016 BCSC 2404 [Deol] at para. 218, and *Dunne v. Sharma*, 2014 BCSC 1106 at para. 103.
- [9] As a result of my conclusions in this case, both scenarios exist here; it is necessary to apportion damages in respect of both indivisible and divisible injuries. Positions of Parties
- [10] The defence suggests as its primary argument that the settlement proceeds from MVI2 must be disclosed and simply deducted from the global award made in this case. I do not agree. The defendant's submissions, in part at least, invite me to treat injuries as indivisible where I have expressly found them to be divisible. Findings of divisibility and indivisibility are inherently fact-specific (see *Deol* at para. 19) and, to the extent that the defendant's submissions challenge existing findings, they are not helpful.

- [11] The defence's alternative position, which is based on the findings I have in fact made, is consistent with that advocated by the plaintiff, at least in terms of approach. Both parties say that I must apportion damages within each head of damage to each injury. With respect to the indivisible injury, I must apply Ashcroft and, as in Cebula v. Smith, 2013 BCSC 1939 at paras. 305-308 and 356, deduct the proceeds from the settlement amount that are attributable to the indivisible injury from the total award for the indivisible injury.

Analysis

- [12] I will address first the award of nonpecuniary damages. The global assessment is \$70,000. I attribute the following amounts to each area of injury as follows: Area Amount Shoulder \$ 2,000 Knee 5,000 Aggravation of low back pain symptoms attributable to MVI2 7,000 Neck and mid-back 7,000 Low back 49,000 \$70,000
- [13] In respect of past loss of income, set at \$150,000, it is my conclusion that neither the shoulder injury nor the knee injury contributed to that past loss. The low back injury was the largest contributor to that loss, although the temporary aggravation in low back symptoms and the neck/mid-back issues contributed to it. I assign to each of these latter, contributing injuries an amount equal to their respective proportion of the non-pecuniary damages, being 1/10 or \$15,000 for each of the low back aggravation and the neck/mid-back issues. I attribute the balance, of \$120,000, to the low back pain.
- [14] The only ongoing symptoms affecting future loss of capacity to earn income arise from the low back pain. The defence and plaintiff agree with this. Accordingly, 100% of the future loss of capacity to earn income, set at \$40,000, is attributable to that low back pain.
- [15] The only indivisible injury is the neck/mid-back injury. In accordance with the reasoning in Ashcroft, the amount received by the plaintiff in the settlement with the defendant in MVI2 that is attributable to this indivisible injury, must be deducted from the \$22,000 awarded here.
- [16] In summary, the defendant from MVI1, responsible for the divisible low back injury and the indivisible neck/mid-back injury, is liable to pay \$209,000 for the low back injury (consisting of \$49,000 in non-pecuniary damages, \$120,000 for past loss of income, and \$40,000 for future capacity to earn income), as well as the difference between the \$22,000 awarded for the neck/mid-back injuries (consisting of \$7,000 in non-pecuniary damages and \$15,000 for past loss of income) minus the amount of the settlement between the plaintiff and the defendant in MVI2 that represents the losses for the indivisible neck/mid-back issues. As in Ashcroft, the parties are at liberty to apply to make further submissions regarding the appropriate deduction to be made as a result of the settlement in MVI2.
- [17] The defendant from MVI2, responsible for the divisible temporary aggravation to the plaintiff's low back injury and the divisible shoulder injury, as well as the indivisible neck/mid-back issues, has settled with the plaintiff and been released from liability in this matter.

[18] The defendant from MVI3, responsible for the divisible knee injury, is liable to pay \$5,000 (in non-pecuniary damages).

Conclusion

[19] In summary the global assessment of damages is as follows: · Non-pecuniary damages: \$70,000 · Past loss of earning capacity: \$150,000 · Future loss of earning capacity: \$40,000 · Special damages (agreed upon): \$4,000 Total: \$264,000

[20] Subject to any further submissions, the defendants in MVI1 and MVI3 are liable to pay all of these amounts less: \$2,000 for the non-pecuniary award attributable to the shoulder injury; \$7,000 for the non-pecuniary award attributable to the low back aggravation; \$15,000 for the past loss of income award attributable to the low back aggravation; and up to \$22,000 for the non-pecuniary and past loss of income awards attributable to the neck/mid-back injury, depending on the amount of the plaintiff's settlement with the defendant in MVI2 attributable to this indivisible injury. "Betton J."

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