
CANADA / JUDGMENT

Gabrilo v. Greater Vancouver Transportation Authority

2008 BCSC 1333

COURT

Supreme Court of British Columbia

DECIDED

7 October 2008

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2008 BCSC 1333 Gabrilo v. Greater Vancouver Transportation Authority

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gabrilo v. Greater Vancouver Transportation Authority,

2008 BCSC 1333

Date: 20081007

Docket: M052753

Registry: Vancouver

Between:

Dinko Gabrilo

Plaintiff

And:

Greater Vancouver Transportation Authority,

Coast Mountain Bus Company Ltd.,

Brendan J. Bannon, City of Richmond,

and Wasim Memon

Defendants

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

Counsel for the Plaintiff:

T.N. Teed

Counsel for the Defendants:

K.A. Cantelon

Date and Place of Trial:

September 8-9, 2008

Vancouver, B.C.

INTRODUCTION

- [1] This is a claim for damages arising out of a motor vehicle accident. The Plaintiff, Dinko Gabrilo ("Gabrilo"), was a passenger in a bus when it was struck by a motor vehicle owned by the City of Richmond and driven by Wasim Memon (the "Defendants") on January 11, 2005 in Richmond, British Columbia (the "Accident").
- [2] Upon impact, Gabrilo fell from his seat behind the driver of the bus onto the floor, allegedly injuring his hips and shoulder. Of paramount interest to this action is the Plaintiff's shoulder injury.
- [3] Wasim Memon admits that the Accident was caused by his negligence, but the Defendants deny that the injuries allegedly suffered by Gabrilo were caused by the Accident.
- [4] Gabrilo admits to a conviction related to this matter on August 24, 2007 for providing information he knew or ought to have known to be false to the Insurance Corporation of British Columbia ("ICBC"), contrary to s. 42.1(2)(a) of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 [Insurance (Motor Vehicle) Act]. Gabrilo admits he was charged, pled guilty, ordered to pay a fine of \$1,000, and restitution of \$1598.85. Gabrilo says he paid legal fees of over \$10,000 related to this matter.
- [5] Gabrilo apologized for what he did. He says he injured his shoulder in the Accident and continues to suffer from the injuries. He seeks damages for his alleged injuries. The Defendants say Gabrilo is a convicted fraudster and his evidence is not credible.

ISSUES

1. Is the Plaintiff entitled to damages?; and
2. If yes, what are the nature and quantum of damages to which he is entitled?

THE EVIDENCE

Gabrilo

- [6] Gabrilo was born in Yugoslavia and immigrated to Canada. His native tongue is Croatian.

- [7] Gabrilo testified about the Accident, the sequela therefrom, his subsequent conviction, the injury he incurred, and the impact that injury had and continues to have on his life and work.
- [8] The Plaintiff alleges he hurt his right shoulder in the Accident; however, he does not know precisely how his fall off the seat in the bus accomplished this. Within a day of the Accident, he saw his physician regarding the injury. Gabrilo acknowledged that he worked for a limited time after the Accident contrary to a recommendation from his physician; however, he ceased working by the end of March of 2005.
- [9] Gabrilo introduced a video taken by or on behalf of ICBC showing him painting after the Accident with Robert Hudson. The video shows how a painter uses his shoulder in painting. Gabrilo is right-handed. He says he can only paint right-handed. His right shoulder hurts when he paints. Gabrilo says he was only able to paint about half-speed and part-time.
- [10] On September 13, 2005, Gabrilo was at his home up a ladder and lost his balance. He began falling and then jumped from the ladder. He landed with one foot on the grass and one foot on a concrete walkway. He broke his heel and was on crutches for some months after the fall. The injury sustained because of this incident is a matter unrelated to the shoulder injury in question.
- [11] Gabrilo testified that he now works in a supervisory role and does much less painting than prior to the Accident. In his supervisory position, Gabrilo earns substantially more than he did as a full-time painter, which was the nature of his work at the time of the Accident. He earned about \$3000 per month at the time of the Accident; he earns approximately \$5000 a month now. Gabrilo still experiences soreness in his shoulder if he paints. He still suffers from his heel injury.
- [12] The Plaintiff admitted that he had lied to various persons including officials from ICBC, which gave rise to the conviction under s. 42.1(2)(a) of the Insurance (Motor Vehicle) Act. He also lied to his family doctor and KARP Physiotherapy.

Dr. Lui

- [13] On September 30, 2005, Gabrilo was seen by Dr. Spencer M. Lui, an orthopaedic surgeon on referral from Dr. Sagorin, for evaluation of his injuries sustained because of the Accident.
- [14] Dr. Lui's report of June 17, 2008 is an exhibit. The report says Dr. Lui saw Gabrilo on September 30, 2005, and reviewed x-rays taken on May 12, 2005 and an MRI performed on September 3, 2006. Dr. Lui saw Gabrilo again on October 6, 2006.
- [15] Dr. Lui does not comment on the heel injury other than to note that, "[h]e suffered a fracture of the left calcaneus, from a fall at his house which occurred on September 12, 2005. He was under the care of Dr. Kendall and he was treated conservatively."
- [16] Dr. Lui says the following at p. 2 of his report:

On examination at the time of his right shoulder indeed showed tenderness of the rotator cuff and particularly over the greater tuberosity. There was minor local swelling but noticeable wasting of the associated muscle group.

In the context of the report, I infer that this observation was made at the time of Gabrilo's initial meeting with Dr. Lui, on September 30, 2005, as the report continues:

The [sic] shoulder had decreased in range of motion in all planes both actively and passively but there was no obvious signs of instability of note. The shoulder had impingement upon abduction flexion.

Drop arm test was marginally positive. Neurovascular structures were intact.

X-rays of the right shoulder taken at Brooke radiology on May 12, 2005 showed moderate arthritis of the right AC joint and minimal arthritic changes affecting the glenohumeral joint. There was no obvious soft tissue abnormality.

The initial impression was that this patient suffered a direct injury of the right shoulder as the result of the motor vehicle accident as he did not have any preceding problem. He was treated conservatively but without success as he continued to have pain and weakness to affect his function.

M.R.I. of the shoulder was therefore recommend for further evaluation which was subsequently performed at St. Paul's Hospital September 3, 2006.

At the time of writing this report, June 27, 2008, Dr. Lui noted that Gabrilo had not been seen or evaluated since October 6, 2006 and thus his current condition could not be commented on.

[17] Dr. Lui expressed the hope that the Plaintiff's condition would "heal and the patient would be able to resume his pre injured status of work and activity" although he might run into a long-term problem. Most of these types of injuries do not require surgical repair.

[18] Gabrilo sought to introduce an updated report from Dr. Lui during the course of trial. The Defendants, whose objection was upheld, opposed this. Dr. Lui was not called as a witness or cross-examined on his expert report.

Robert Hudson

[19] Robert Hudson ("Hudson") testified for Gabrilo. Hudson's company had employed Gabrilo prior to the Accident as a painter and currently employs Gabrilo as a supervisor.

[20] Hudson testified that he was not aware of Gabrilo having any difficulty with his right shoulder prior to the Accident. Gabrilo reported having the injury following the Accident. Although Gabrilo did some painting after the Accident, he was much slower.

- [21] Hudson was aware that Gabrilo had been videotaped painting after the Accident. He had painted with Gabrilo after the accident and observed his slowness. Painting requires extensive use of the shoulder.
- [22] Hudson said that Gabrilo is a capable supervisor although he sometimes has difficulties with communication. Gabrilo is best at communicating with smaller groups.
- [23] Hudson was not aware of Gabrilo's heel injury.
- [24] Hudson was aware of Gabrilo's conviction.

Jericho Gabrilo

- [25] Jericho Gabrilo is Gabrilo's brother. Jericho Gabrilo testified that Gabrilo has always been a hard worker and did not have shoulder problems prior to the Accident. He stated that Gabrilo continues to complain about his injury.
- [26] Jericho Gabrilo is aware of Gabrilo's conviction. He testified Gabrilo took the matter seriously and was very concerned about it. He is sympathetic to Gabrilo and hopes for a good outcome from the trial.

Ileana Gabrilo

- [27] Ileana Gabrilo is Gabrilo's wife. She speaks Croatian and communicates with Gabrilo in both Croatian and English.
- [28] Ileana Gabrilo has been employed by the Vancouver Coastal Health Authority for more than 20 years. She is a Coordinator/Manager responsible for 25 technicians for sterilizing equipment for emergency and other services.
- [29] Ileana Gabrilo said that Gabrilo did not have any issues with his shoulder prior to the Accident and that he regularly performed yard work around the house. Gabrilo phoned Ileana Gabrilo regarding the Accident, stating his arm had been pushed back and his hips had sustained injury. Gabrilo no longer does yard work around the house. Ileana Gabrilo or their son now completes this work.
- [30] Since January of 2005, Gabrilo has complained about his shoulder injury; however, his complaints are less so now than before. Gabrilo has continued working. If he works a particularly long day, he will complain that his shoulder is hurting.
- [31] Ileana Gabrilo recalls Gabrilo's injury sustained from falling off a ladder in September of 2005. At the time of the incident, Gabrilo called Ileana Gabrilo and she called an ambulance. Gabrilo also has complaints about his foot following his fall, which continue today; however, these complaints are less frequent than those regarding his shoulder.
- [32] Gabrilo was on crutches for three months following his fall. He had difficulty using the crutches following his fall. The crutches aggravated his shoulder pain.

[33] Ileana Gabrilo was aware of the fraud charges against her husband. She was not present with Gabrilo when he met with various persons in relation to the fraudulent claim; however, in retrospect she thinks her presence was warranted.

ANALYSIS

[34] The Defendants argue Gabrilo's evidence is unreliable and asks that the action be dismissed. Gabrilo admitted to lying to various persons as noted above. He was convicted of an offence in connection with the matter that is the subject of this claim.

[35] I agree that, in the circumstances, the evidence must be carefully scrutinized; however, I am not prepared to reject the evidence simply because it is proven, as Gabrilo admits, that he lied and was convicted concerning those lies.

[36] The Defendants also say that Gabrilo continued to lie about these matters at his examination for discovery. Gabrilo was asked about statements he made at discovery relating to these events. In particular, it was suggested that this passage reveals further lying on his part:

459 Q. All right. I'm telling you that on March 18th -

A. Yes.

460 Q. -- they said that you said you weren't working and hadn't worked since February 28th.

A. February 28th?

461 Q. Yeah.

A. Yeah, I said I don't work, but I work.

462 Q. So that wasn't true?

A. Yes.

463 Q. Why did you tell them that?

A. I told them because I don't ask for lost wages.

464 Q. All right, why did you tell them that you weren't working when you were? Why did you tell Karp that you were not working?

A. What they have, they have. I tell them I work. They have -- they have my -- my -- my -- my time sheet list. I work.

465 Q. But why did you tell them -

A. And I tell the ICBC that I work.

466 Q. Why did you tell Karp that you weren't working?

A. Karp?

467 Q. Yes.

A. February 20?

468 Q. All right. I'll tell you again.

A. Which day? What day?

469 Q. On March 18th, --

A. Yes.

470 Q. -- they say that you said --

A. Yes.

471 Q. -- that you weren't working and hadn't worked since February 28th. Did you say that?

A. I say that, but I work.

472 Q. All right. Why did you say that?

A. Why I say?

473 Q. Yes. Why did you say that if it wasn't true?

A. Why I say that?

474 Q. Yes. Why did you say that to Karp if it wasn't true?

A. I work. I said to them -- I don't remember what I say to them anyways. I don't remember.

475 Q. All right. I think a minute ago you said you did that. Now you don't remember?

A. I don't remember. I don't remember what I say to them.

476 Q. Did you just forget a second ago?

A. No, I don't remember. I don't remember that day do I see him or not. I don't remember.

477 Q. All right, why did you say a second ago that you did say that?

A. I said it to ICBC obviously I don't work, but I work.

478 Q. All right. If I have to, I will have the transcript read back to you.

A. All right.

479 Q. A few moments ago, you agreed that you did say to Karp on March 18th that you hadn't worked since February 28th.

MR. TEED: Well, let's just read the transcript back and see.

MR. CANTELON: All right. Let's do that.

A. Oh, I don't know.

MR. TEED: Just listen to the question carefully.

THE WITNESS: Yes, I understand, but --

MR. TEED: Just relax and then answer the question. You know, he has the right to ask you all these questions.

THE WITNESS: Yes, yes, I agree with that.

(QUESTIONS AND ANSWERS 469 TO 471 READ BACK.)

MR. CANTELON:

480 Q. All right. Do you remem -- so you do remember saying that; is that correct?

A. No, I don't remember. I don't remember.

481 Q. Well, you did remember when you -- were you lying when you answered that question a moment ago?

A. I don't remember.

482 Q. All right. I'm asking you about something that you said about two minutes ago, all right? About two minutes ago, you agreed that you told Karp that you had worked.

A. Yeah.

483 Q. All right? Now you say you don't remember?

A. I work. The ICBC they have -- they have my time sheets. I work.

[37] During the course of this passage Gabrilo admits at least six times to having lied (QA 461, QA462, QA471, QA477, QA482, QA483); however, he becomes confused when asked questions which seem intended to elicit either details of his lies or the reasons for his having lied. In every case, however, Gabrilo goes back to his admission of having lied.

[38] In my view, while one can appreciate the frustration that counsel for the Defendants must have experienced during the examination, the passage illustrates confusion on the part of Gabrilo. He readily acknowledges that he lied, but he becomes confused with the subtleties the examiner is attempting to elicit. This is consistent with his command of English, his personality, and the manner in which he gave evidence before me at trial.

[39] In light of the history of this claim, Gabrilo's admitted lies, and conviction for those lies, I accept that the evidence concerning the present claim must be carefully, if not scrupulously, examined. On balance, however, I accept that Gabrilo hurt his shoulder in the Accident.

[40] The evidence before me which supports Gabrilo's assertion that the accident caused the injury is the evidence of Dr. Lui, as well as the evidence of Hudson and Gabrilo's family members. Dr. Lui, who examined Gabrilo shortly after the heel injury in September of 2005,

noted that there was "noticeable wasting of the associated muscle group" respecting the shoulder. It is suggested that the shoulder injury was caused by the fall from the ladder. How can there be noticeable wasting of the associated muscle group if the shoulder injury was caused by the fall from the ladder two weeks before the examination?

- [41] Furthermore, the complaints of Gabrilo after the Accident and his performance before and after the Accident are corroborated by Hudson, who heard Gabrilo's complaints and saw his diminished performance immediately before and a short time after the Accident.
- [42] I am satisfied that Hudson is an independent witness who views Gabrilo only as an employee. Although Ileana Gabrilo and Jericho Gabrilo are family members, their evidence confirms that of Gabrilo and Hudson on this point, namely, that he had no shoulder complaints before the Accident and had complaints about the shoulder immediately thereafter.
- [43] In coming to this conclusion I am cognizant of and apply the "but for" test regarding causation approved by the Court of Appeal in *Bohun v. Segal*, 2008 BCCA 23, [2008] B.C.J. No. 97 at para. 41, citing *Barker v. Corus*, [2006] UKHL 20, [2006] 3 All E.R. 785 at para. 1. The Supreme Court of Canada reiterated application of the "but for" test in determining causation in *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] S.C.J. No. 7 at paras. 18-23, following *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14, [1996] S.C.J. No. 102 [Athey]; *Snell v. Farrell*, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73; and *Blackwater v. Plint*, 2005 SCC 58 at para. 78, [2005] 3 S.C.R. 3.
- [44] That said, I am not satisfied that Gabrilo's current complaints are the result of the Accident. Gabrilo acknowledged that the heel injury incurred in September of 2005 as a result of the fall necessitated a lengthy period on crutches that aggravated Gabrilo's shoulder pain. The aggravation of the shoulder pain by this event is not compensable in this claim.
- [45] At times Gabrilo used a wheelchair, which is an indication of how much weight his heel could bear, and, correspondingly, the amount of weight, while on crutches, his shoulders had to bear. The extent to which that intervening event has led to or contributed to his present condition is unknown. The only medical evidence before me is that of Dr. Lui who, at the time of writing his report of June 27, 2008, had not seen Gabrilo since October 6, 2006.
- [46] In summary, the Plaintiff is entitled to damages arising from the Accident. I am satisfied that the claim arising from his shoulder injury is one that, in the ordinary course of events, would likely have resolved by trial. While he may have ongoing symptoms, it has not been shown that these symptoms were caused by the original Accident. Thus, in my view, he is entitled to damages based only on a claim where the symptoms would have resolved by trial.

DAMAGES

Non-Pecuniary Damages

- [47] The Plaintiff cites two cases on non-pecuniary damages.

- [48] In *Kralik v. Mt. Seymour Resorts Ltd.*, 2007 BCSC 258, [2007] B.C.J. No. 360 [Kralik], Bennett J. awarded the plaintiff \$75,000 in non-pecuniary damages where a fractured right humerus and a tear to the rotator cuff were given surgical treatment. The plaintiff was off work for 18 months and showed permanent functional impairment of the right shoulder and arm.
- [49] The Kralik case is not helpful in this instance because Gabrilo could and did work as a painter after the Accident; albeit only intermittently and in pain. After the heel injury, Gabrilo was unable to work at all for months.
- [50] In *Castillo v. Westfair Foods Ltd.*, [1999] B.C.J. No. 1326, 88 A.C.W.S. (3d) 1176, Smith J. awarded the plaintiff \$25,000 in non-pecuniary damages where the diagnosis was a moderately severe shoulder, chest, and neck muscle strain. The plaintiff was treated with cortisone and an anti-inflammatory. A physical capacity examination revealed that she had an impaired ability to perform medium strength work. In that case, three years post-accident, the plaintiff's prognosis was for complete recovery albeit in 12 to 18 months.
- [51] The Defendant refers me to a series of cases that award between \$7,000 and \$15,000 for non-pecuniary damages: *Jahn v. Manesiotis*, 2003 BCSC 1260, [2003] B.C.J. No. 1916; *Mangat v. Jackson*, 2004 BCSC 319, [2004] B.C.J. No. 467; *Dobie v. Brousseau*, 2005 BCSC 1718, [2005] B.C.J. No. 2661; and *Kenny v. Leveson-Gower*, 2005 BCSC 447, [2005] B.C.J. No. 701 [Kenny].
- [52] In my view, while each of these cases turns on its own facts, Gabrilo's case is most comparable to that in *Kenny*. In *Kenny*, the plaintiff was a passenger in a stationary vehicle that was struck from behind. As a result of the accident, she suffered mild to moderate injuries to her neck and shoulder. Non-pecuniary damages are assessed at \$13,000.

Future Wage Loss

- [53] Regarding future wage loss, the Plaintiff acknowledges that in his present employment involving mostly supervisory work unaffected by his injuries he earns \$5,000 per month, which is \$2000 per month more than he received when he worked hourly as a painter. Nevertheless, the Plaintiff states that his concern is that he could not, in the future, fall back on the painting occupation if needed.
- [54] As the Defendant points out, Dr. Lui's report notes that any "[l]ong-term prognostication unfortunately could not be given " as the patient had not been seen since October 2006. This issue is further complicated in that the Plaintiff has had ongoing heel problems from his fall from the ladder in September of 2005 that have nothing to do with the injuries caused by the Accident. Indeed, he was unable to perform any work following this fall for some months.
- [55] In *Athey*, the Supreme Court of Canada noted that hypothetical events need not be proven on a balance of probabilities but are simply given weight according to their relative likelihood. In this case, there is no degree of relative likelihood proven. The patient was not reassessed and the etiology of his current complaints is not proven.

- [56] Moreover, the Plaintiff's current occupation, which earns him more income, is most likely to be available to him in any event as it is less affected by his shoulder discomfort, which is attributable to the Accident, and by his heel injury, which is unrelated to the Accident.
- [57] In any event, as I have found that the Plaintiff has not shown that his ongoing symptoms are a result of the compensable injury, I am not prepared to allow any claim for future wage loss.

SUMMARY

- [58] The Plaintiff's action for damages arising from the Accident is allowed. General Damages are assessed at \$13,000.
- [59] In the ordinary course costs would follow the event at Scale B. If there is an issue as to costs, they may be spoken to.

"The Honourable Mr. Justice Savage"

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